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THE ADMINISTRATION OF CIVIL JUSTICE IN MADRAS—1895.

The annual quantitative appraisement of the work of the Civil Courts has been published. Once more the Government order pronounces the work done by District Courts unsatisfactory, and observes:—"The figures cannot be regarded as satisfactory. Arrears are heavier under each head than they were five years ago, and the number of original suits disposed of was the lowest in the *quinqennium*, while the suits pending at the end of the year were more numerous than those instituted during its course. The disposals of small cause suits were also fewer than in 1894." We find also that a larger percentage of decisions of District Courts was reversed on appeal than of the decisions of inferior courts. The High Court confirmed only 52·62 per cent of the judgments appealed against, while it confirmed 71·43 per cent of the decisions of Subordinate Courts. We do not wish to lay very much stress on inferences suggested by these figures, but there can be no doubt that the District Judges form by far the weakest portion of our judicial machinery. We have repeatedly taken occasion to point out the utter injustice done to these officers and to the public by appointing them to high judicial office without giving them any training to qualify them to discharge properly the duties of the office. An attempt has been made during the course of the present year to cure the evil by appointing a civilian as Sub-Judge of Calicut, preparatory to his being made a District Judge, but the remedy devised was not of the right sort. There is absolutely no difference between the work done by a Subordinate Judge and that done by a District Judge. If anything, that of the former is the more onerous as the trial of all heavy original suits falls to his share, while his colleague of the District Court generally confines himself to appellate

work. It is absolutely preposterous to expect a gentleman to whom the law of Civil Procedure and the whole body of substantive civil law are '*terra incognita*' to discharge satisfactorily or unsatisfactorily the responsible duties of a Judge of unlimited civil jurisdiction. No one could believe that such a thing could be attempted, if he did not see the farce enacted every day in this country. Meanwhile the legal profession is improving in intelligence and professional ability everyday. What other result could we expect from this state of things than contempt for the judge on the part of the bar, answered by a feeling of sullen asperity and an absolute want of sympathy on the part of the judge towards the profession. We have spoken plainly in the hope that an attempt may be made to effect some real improvement in the quality of our District Judges, from whom we have to draw two at least of the Judges of the High Court. The young civilian before he is allowed to administer criminal justice is required to pass an examination in criminal law, though that is infinitely easier to master than civil law. It certainly stands to reason that before an officer, however intelligent he may be, is appointed as a Civil Judge, his capacity for the office should be tested by an examination of some sort. Then again, an officer has to undergo a period of probation before he is appointed an Assistant Collector; why is no such thing necessary before he is made a Sub-Judge or a District Judge? If our District Judges are to command respect or to discharge their functions properly, two changes seem to be necessary, first, to require a civilian soon after he begins his career to decide whether he will in the end be a Collector or a Judge and if he chooses the latter office, to insist on his qualifying himself for the office, by passing an examination in the important branches of Civil Law and gaining experience in subordinate judicial offices; second, to insist on a proper number of the more able officers taking up the judicial line and not to make the office of a judge, a badge of inferiority. This is done to some extent in Bombay and there, therefore, the civilian judges are equal to their task.

For the Munsiffs, the Government has nothing but praise. What is expected of them is that they shall cope with the increasing work of their courts, and he that shows forth most of it, is best praised. No regard, apparently, is had to the fact that they are already doing a great deal more work than it is possible to do con-

sistently with justice to litigants. They are indeed driven like beasts, mere machines for turning out judgments and orders. If they are to have time for recreation, or study, or reflection, the number of Munsiffs must be increased by one half of their present number. The High Court observes apparently with considerable satisfaction:—" 13 District Munsiffs disposed of more than 1,000 ordinary suits each. 8 District Munsiffs disposed of 500 or more contested suits each. The District Munsiff of Cuddalore disposed of 671 contested ordinary suits, 2,000 or more Small Causes were disposed of by each of 8 District Munsiffs and 5 District Munsiffs disposed of 500 or more contested Small Causes each." 'The more the merrier' is the tone of the report, but, not one word as to how this enormous quantity of work is turned out. In addition to the disposal, it should be remembered, of a correspondingly large number of miscellaneous and execution applications, the statistics of which are not available to us. The result of this heartless system is that the ablest and healthiest officers get exhausted and behind hand and become unable to cope with the advance of legal knowledge in the course of a few years. In all seriousness, it is time to mend matters, and finance ought not to stand in the way, seeing that we get an annual surplus of 15 lacs from litigants after defraying the cost of administering justice. We cannot but repeat that the system of recruiting the upper judiciary service is very defective in that no portion of it is drawn from the bar. The advantage of introducing into the class of Subordinate and District Judges, fresh blood saturated with the most advanced principles of law and the highest traditions of justice and inbued with a spirit of independence, is absolutely ignored both by the High Court and by the Government. The appointment of professional men to high judicial office would cultivate harmony and cordiality between the Bench and the Bar, and furnish an incentive to men of parts and culture to improve their stock of knowledge beyond the ordinary necessities of a practising lawyer. Even amongst the class of Munsiffs, promotion along a good many steps of the ladder depends solely on seniority. Talented and energetic men who ought not to be allowed to rot at the bottom are required to cool and to bide their time; while some seniors above fifty are appointed as Subordinate Judges, it would seem almost a *solatium* for their advancing age and failing energies.

We believe that the High Court Judges are anxious to make some improvement in this matter, but we think that no time should be lost in plainly enunciating the rule that preferment will go by merit alone.

The statistics of the work of the High Court call for several observations. We are told that the number of applications for revision decreased, but it is explained that this decrease is unreal, "as the high figure of 1894 was due to batches of connected cases." This is probably so; but we apprehend that the figures for 1896 when they are published will show a considerable reduction which cannot be so accounted for, but is due to a feeling amongst professional men that the judges do not look with favour on applications for revision. We cannot help observing that this feeling is not altogether unfounded; and if we are right in our view, we cannot but regard it as very unfortunate. By far the large majority of applications for revision is against decisions in Small Cause suits. Any one who has experience of mofussil courts knows that as a result of the combination of Small Cause and Regular jurisdictions in the same individual, the courts generally are anxious to dispose of their small cause work as quickly as possible, and it is not rare to find a judge disposing of fifty or sixty or even eighty cases a day. Very often the examination of more than one or two witnesses on each side is discouraged and the judge is anxious to pronounce his judgment before the client or his counsel thinks that the court has understood the contentions of the parties. The result shows that out of 1936 applications for revision disposed of in 1895, including applications under S. 622, Civil Procedure Code, the High Court interfered in no less than 399 cases or 20 per cent of the whole, and if we take the application in Small Cause suits alone, the proportion would be found to be still larger as the High Court rarely interferes in applications under S. 622 of the Civil Procedure Code. It is a serious question, whether in justice to poor people, the Government should not establish separate courts of Small Causes which will not consider Small Cause Suits an unimportnat appendage to their legitimate work to be got rid off as speedily as possible. It would be removing the only salutary check on the perfunctory disposal of such litigation, if the feeling should become prevalent amongst judges, that the High Court is not disposed to scan their Small Cause work and are willing to leave such suits

to their final arbitrament. Till a few months back, the High Court recognising the importance of revision and having regard to the petty nature of the claims involved in such suits, acted in a liberal spirit in allowing all available matter to be placed before it by practitioners though some portion of it might not be printed; but the smallness of the subject-matter seems now to be regarded as in some measure disentitling these cases to the consideration of the High Court, and we perceive an increasing strictness on the part of the judges in refusing to recognise any portion of the record that is not printed.

Another subject to which we wish to draw attention, though, perhaps, it does not strictly form a portion of our present subject, is the manner in which criminal revision work is done by the High Court. There is no instance, perhaps, in which the letter and the spirit of the law have alike been set at nought by Judges to suit the exigencies of their work. The Criminal Procedure Code confers on the High Court, large powers of interference in criminal cases so that there may be no failure of justice. Such power exists whether the question decided by the lower courts is one of fact or of law. But the High Courts have held as a matter of practice, that they will not generally interfere in revision on questions of fact. We have carefully looked through the decisions enunciating this rule, but have not been able to discover the enunciation of any judicial principle to support it.

It is not in the interests of legal science, but of justice, that the power of revision is conferred on courts; and a man may be wrongly convicted, and serious injustice done to him as much by misappreciation of evidence, as by misconception of the law. In some courts, no doubt, and notably in Calcutta, the Judges do occasionally interfere on facts, when they are satisfied that there has been a failure of justice; but we have for several years seen no instance of such interference in the Madras High Court. We further find that the Madras High Court has set its face against revision at the instance of the complainant in cases of acquittal. The Judges have frequently held that, in such cases, Government alone ought to be permitted to move the High Court, though they admit that such is not the express provision of the law. On the other hand, it is the duty of the Judges of their own accord, as far

as possible, to rectify the errors of the lower courts on revision; and how can the courts refuse to take notice of them on the mere ground that it is the complainant who draws their attention to them. It is, moreover, incorrect to suppose that the Government is the real party concerned in all criminal cases. Surely such is not the case with regard to compoundable offences; and even in other cases, except where the crime in question is of a very serious nature, and the case itself is one of notoriety, or affects the public revenue Government is not likely to put itself to the trouble and expense of moving the High Court. Applications for revision in criminal cases have, within the last few months, considerably diminished in the Madras High Court, and we cannot but think, that this will tend to the perfunctory disposal of criminal work by the magistracy.

In 1895 the mumber of appeals against the decision of a single Judge of the High Court, both on the original side and on appeal from mofussil courts, appreciably increased. Only 57 per cent. of the decisions on the original side were confirmed on appeal. The report does not tell us the percentage of confirmation in appeals from the appellate orders of a single judge, but the total number of appeals disposed rose from 45 in the year 1894, to 79 in the year 1895. We regret to observe that, in the matter of these appeals under the Letters Patent again, the Judges have manifested an uneasy feeling that the appeals are vexatious. On the other hand, if there is any case in which practitioners are particularly careful not to put in appeals which in their opinion ought not to prevail, it is in the case of decisions of a Judge of the High Court. The statistics of the result of such appeals until 1894 fully bear out our statement that the appeals cannot be regarded as unjustifiable.

The report tells us that rules were framed by the High Court during the year 95 in respect of several matters connected with the mofussil courts. There have been several changes of rules, especially with respect to translation and printing in regard to the practice in the High Court also. It would be very desirable that in the matter of framing rules to regulate practice, the legal profession should be consulted before they are finally passed. It is often the case that the rules framed by the court are found to be unworkable or objectionable in various ways. It

would be far easier to induce the Judges to frame proper rules than to persuade them to repeal or correct incorrect rules after they have been framed.

Another matter, about which it is necessary to make some remarks, is the change which has in recent years been inaugurated, in respect to the mode of taking down evidence in appealable cases. The old practice was that the evidence was fully taken down by a clerk in the language in which the witness was examined, or in the language of the Court, while the judge used to make notes for his own use. At present, most of the judges are authorised to take down the evidence in English, in their own hand, and, when that is so, they are bound so to take down the evidence. This throws great and unnecessary labour on judges, and makes it impossible for many of them to follow the case as the evidence is being given, as their attention is absorbed in the duties of scribe. Often it is also the case that the judge omits a great portion of the evidence on account of the labour involved in taking down the whole. He naturally neglects what appears to him unimportant at the time; but experience shows that such evidence sometimes turns out to be most important. Besides this, the judge owing to the continued strain of writing sometimes happens to make inaccurate translations of the evidence, and such errors, it is generally impossible adequately to correct afterwards. There is a growing discontent in the profession with the present practice, and we think it would be expedient, generally, if not always, to withdraw the powers conferred on judges of the lower courts to take down the evidence in their own hand and as far as we are able to know their sentiments, the judges themselves would welcome such a change. We may, in passing, observe that the examination of witnesses can seldom be thoroughly effective in the present circumstances, in consequence of the unduly long interval between the putting of one question and another, necessarily occassioned by the writing down of the answer. Unless the system of short-hand writing is resorted to, many a clever witness will be able to elude even the most successful cross-examiner.

Another topic which has for sometime been engaging the attention of the profession, is the present limited right of interference of the High Court in second appeals. It has been suggested

that a second appeal on facts should lie to the High Court, when the decisions of the lower courts are not concurrent. We think there are various difficulties in the way of such a rule. The safest course, probably, would be to invest the High Court with a right to interfere with findings of fact, where they are manifestly erroneous. The Government order on the report draws attention to the increase in the number of suits decided by arbitration during the year. It is not clear what the correct inference to be drawn from this is; but we trust it does not show any diminution of confidence in the constituted tribunals of the country.

TRANSLATED FROM VAIDYANATHA DIKSHITIYAM ON ANULOMA CASTE.

On this Manu says "sons begotten by men of any caste on their wedded wives of the same caste not previously defiled, are known to belong to that caste. Sons begotten by men of any of the twice-born castes upon women of inferior caste, belong to the caste of their fathers, with the blemish attaching to their mothers." (2) *Devala* observes: "Of sons, those born of parents of the same caste are the best; next in order, those who are begotten by men of superior caste on women of inferior caste; those who are begotten by men of inferior castes on women of superior caste are considered as sinners and out-castes. (3) Manu says, "those who are begotten upon women of inferior caste by men of superior caste, are known as *anulomas*. One begotten upon a *Kshatriya* woman by a *Brahmin* becomes a *Brahmin* by caste. He shall always study the science of medicine, the *Athurvaveda* and the science of archery. Riding the elephant and the horse is permitted to him. One begotten upon her by this man (*Brahmin*) in stealth (by illicit intercourse) must live by astronomy. Those begotten by a *Brahmin* upon women of the three inferior castes, those begotten by a *Kshatriya* on women of the two inferior castes, those begotten by a *Vaisya* upon women of the inferior caste, these six (classes of sons) are considered inferior. (4) *Yajnavalkya* says "One begotten by a Brahmin upon a woman of the *Kshatriya* caste is called a *Murdhavasikta*, on a *Vaisya* woman an *Ambashta*, and on a *Sudra* woman a *Nishada* or a *Parasava*. Sons begotten by a *Kshatriya* on women

of the *Vaisya* and the *Sudra* castes are called respectively *Mahishya* and *Ugra*; son begotten upon a *Sudra* woman by a *Vaisya* is called *Karana*. This rule applies where these are wedded wives." This nomenclature of *Savarna, Murdhavasikta,* &c. applies where the women are the wedded wives. (5) However, there is the Smriti of *Sankha* which says that one begotten by a Brahmin upon a *Kshatriya* woman becomes a *Kshatriya*; by a *Kshatriya* upon a *Vaisya* woman, a *Vaisya*, and by a *Vaisya* upon a *Sudra* woman, a *Sudra*. But this is said to enhance the importance of the *Kshatriya* and other castes and not to disprove the nomenclature of *Savarna* &c. Therefore, it is that *Vignaneswara* says that the *Upanayana* &c., of *Murdhavasikta* and others are to be performed with *danda ajina,* holy thread &c., as in the case of *Kshatriyas* &c., (6) *Manu*, also says "a Brahmin begets upon a *Vaisya* woman a son called *Ambashta*; upon a Sudra woman, a *Nishada* or *Parasava*. A *Kshatriya* begets upon a *Vaisya* woman a son called *Mahishyambashta*. This last should study the science of medicine and *Ashtangam* for his livelihood. Son begotten in stealth by a *Kshatriya* upon a *Vaisya* woman is called a *Soundika*. They shall live by dealing in horses and this last by servitude. The son begotten by a *Vaisya* on a *Sudra* woman is *Ugraka* by name. He should live by selling sheep or woollen blankets or may always guard the harem under the orders of kings. If born of illicit intercourse he will become a *Katakara* and shall sell mats of straw. The son begotten upon a *Sudra* woman by a *Kshatriya* is known as *ugra* whose deeds and recreations will be cruel and whose body is composed of the elements of a *Kshatriya* and a *Sudra*. The son begotten upon a *Vaisya* woman by a *Brahmin* becomes a *Nishada*. He shall practise magic and medicine always or manufacture sword blades &c. If born of illicit intercourse, he becomes a *Katakara* and thence a *Napitha*. His profession will be shaving above the navel and making pots with earth. The son begotten by a *Brahmin* upon a *Sudra* girl is a *Parasava*. He shall earn his livelihood by worshipping *Bhadrakali*, dancing and playing on musical instruments. If begotten upon her by stealthy intercourse, the son becomes a *Nishada*. He must live by deceit, singing or killing beasts. One begotten upon a *Sudra* girl by a *Kshatriya* is called a *Doushanta*. A *Doushanta* should live by catching beasts or fish and by making scythes and other edged weapons. If begotten in stealth he becomes a *Sulika*. He must

always, with the *sula* (*tridsent*) in his hand, punish those who have been sentenced by the king. The son begotten by a *Mahishya* upon a *Karna* woman becomes a *Rathakara*. *Thaksha, Silpi, Varthiki Lohakara* and *Karmakara* are other names for this man. He could perform sacrifices, wear the holy thread and perform *Adhana*. He shall study the science of architecture and build towers, make statues, the sacrificial utensils for the use of the twice born classes, golden ornaments, agricultural tools and writing tools. (7) *Sankha* says that a *Rathakara* could perform sacrifices and *Adhana*, and wear holy thread and he must earn his livelihood by studying architecture.

ON ADOPTION.

Here the deprecation of the adopted son applies to adoptions from different *gotras*, for, says *Saunaka*, " The adoption of a son by any Brahmin must be made from amongst *sapindas* or kinsmen connected by an oblation of food, or, on failure of these an *asapinda*, one not so connected, may be adopted. Otherwise, let him not adopt. Amongst *Kshatriyas*, adoption must be made from their own class; in default, may be made even from the general family following the same primitive guide. *Vaisyas* from their own class, amongst *Sudras* from among *Sudras*; amongst all, in their own classes only and not otherwise. A daughter's son or a sister's son may be adopted by *Sudras* in case of distress."

Commentary:—All must adopt from among their *gnatis* or may adopt a daughter's son or a sister's son; but *Sudras* may adopt a daughter's son or a sister's son only in case of distress; therefore, only the adoption from different *gotras* is deprecated by sages who laid down the law for the *Kali Yuga*, when they said that adopted sons and sons other than the *aurasa* sons would not be counted among sons. Therefore, if available, sons must be adopted from the same *gotra*.

(2) Manu says " If one among brothers of whole blood be possessed of male issue, *Manu* pronounces that they are all fathers by means of that son."

Commentary:—When there is the son of the brother, no one should be adopted as a son. (3) On this point *Vignaneswara* also observes " This text of *Manu* is for the purpose of prohibiting the

adoption of any others while the brother's son is available for adoption and not for the purpose of conferring on the brother's son the status of a son." (4) In *Kaladarsa* also. "The meaning of this text of Manu is that a brother who has no son must adopt his brother's son when one is available and none others. Otherwise, the rule of inheritance which postpones the brother's son of the deceased to his widow, daughters and brothers, becomes inoperative. But it is said that (5) in the case of persons adopted into a different *gotra*, their rights of inheritance, liability to pollution and their relationship as *gnatis* in the *gotra* of their birth, cease. All these attach to them in the new *gotra*. (6) Besides *Manu* says "The son who is adopted and who possesses all good qualities does take the property of the adoptive father though adopted from a different *gotra*. The adopted son does not take the *gotra* and the property of his natural father. The relationship which creates the right to inherit attaches to him who performs the oblations." (7) Another *Smriti* says "those who are adopted into a different *gotra* must have their initiatory ceremonies performed in the *gotra* of their adoption. Fathers by mere birth are discharged by their sons in adoption. The marriageability of the adopted son during his elder brother's bachelorship, his liability to pollution, his right of inheritance and the rituals he has to perform according to *Srutis* and *Smritis*, have reference only to the *gotra* of his adoption." All this applies where a boy of the same *gotra* is not available for adoption. (8) For the *Smriti* says "In default of persons in one's own family, those in the family of the mothers are to be prefered; in default of these, any other duly adopted as a son. The son of *gnatis* well descended is held best for adoption, those born in the mother's family are middling, those of other *gotras* are the worst. The son must be adopted with the preliminaries prescribed by the code usually followed by the adopter. " (9) *Katyayana* says, "As the maiden given in marriage attains the status of a wife only when she takes the seventh step, so the given son attains the status of a son when *jataka* and other rites are performed. Though given for a son, he does not become one if *jataka* and other ceremonies are not performed. How could he become heir?" (10) *Prajapati* says. "The father who takes a son must observe all regulations as to the age of the son and perform *Namakarana* and other ceremonies subsequently as in the case of

an *aurasa* son. Either in his 5th, 7th, 8th or 9th year, the parents should give their son; and the husband and the wife together should take." The *Sangraha* says "The adoption of a child on the twelth day of his birth before the performance of tonsure, is best, middling, if after tonsure, and worst, if after *Upanayana*. The adoption of one whose marriage has been performed will lead to the annihilation of the family. None should give a married man in adoption but in case of distress. In case of distress one may give the second son (one not married) in adoption" (12) Another *Smriti* says, a woman after her husband's death should neither give, nor take the eldest son in adoption. So says *Bodhayana*" (13) *Daksha* says:—Even in extreme distress the eldest born son should not be given in adoption. If a woman after her husband's death gives, she will go to hell. A childless widow must adopt a son with the consent of father or brother &c., otherwise she will go to hell. (14) So it is said "In case of distress a virtuous wife may give her son invested with the thread, not her eldest-born, though of twelve years of age as in the case of *Sunassepa*" (15) True, *Apastamba* says, that there is no buying or selling of children and *Yagnavalkya* also holds that gifts could be made except of wife or son and without prejudice to the family of the donor; but these refer to gifts of eldest born or only sons. (16) For says *Vasishta*. "The eldest born son should not be given or taken in adoption, nor an only son, for he lives for the benefit of his ancestors. Let not a woman take or give a son in adoption except with the consent of her husband. He who would adopt a son must invite his kinsmen, inform the king, perform the *Vyahriti homa* in the centre of his residence, must take a son nearly related to him." (17) The *Bahvrucha Brahmana Sunassepakhyana* also says that the eldest born son should not be given in adoption. (18) *Saunaka* also says, no son should be given in adoption by one who has an only son. Son should be given in adoption by one who has many sons." (19) *Bodhayana* also says "as the son is born of the sperm and the bood of the parents, they have the power to give away, to abandon or to sell their son: but an only son should neither be given nor taken in adoption: nor should a female give or take a son in adoption except with the consent of her husband." The text of *Manu* which says that the son may be given by the mother or the father, only confers the power to give, on a wife with the consent of her living husband and does not apply to

the case of a widow. When so given, he takes a fourth share in case of the birth of an *aurasa* son subsequently (20). The benefit of adopting a son is thus described. *Jabali* says :—" By the very fact of adoption the son absolves the father from sins. The son given attains the status of a son and the person taking him in adoption, is discharged from obligation" (21) The *Mantra* also supports this view "I take you for virtue: I take you for progeny" (22) But there is a text which says." He who abandons his family and goes over-to another is from that sin called a *Kandaprishta* and as he has abandoned the family of his ancestors he becomes unfit for all *Karma.*" However, this may apply only to cases where one gives himself in adoption or to cases of adoption after marriage. This code of rules about adoption of sons is laid down by *Sounaka* and *Bodhayana* and others.

ON MARRIAGE.

On this subject Vishnu says " Having assiduously studied the Vedas and learned them by rote, with a knowledge of their import, let him marry a girl of excellent marks after performing *samavartana.* Manu says " let a twice born man marry, after he has with the permission of his preceptor, bathed (on the completion of his studies) and performed *samavartana,* a wife of the same caste and endowed with good qualities.

The qualifications of the bride. Manu says " let him not take to wife a girl who has reddish hair or eyes, who has an excess of limbs, or who is diseased, who has either no hair, or too much hair, who is loquacious, who is of a reddish-brown complexion, who bears the name of a star, a tree, a river, a barbarous nation, a mountain, a bird, a snake, or a servant, nor one who bears a terrific name. Let him marry a wife whose limbs show no defect, whose name is agreeable, who has the gait of a swan or an elephant, who has fine hair and small teeth and tender limbs. She, who is dwarfish, tall, lean, or corpulent who has reddish brown eyes or who is of a yellowish white complexion is not to be preferred or accepted, for she will bring death to her husband." (3) *Narada* says :—" she who is suffering from chronic and loathsome complaints, she who is deficient of limbs, she who is immodest, she who has had previous carnal knowledge, she who has fixed her thoughts on another, all

"these are unfit to be married. These have been declared to be faults in maidens." (4) *Vyasa* says "Let not a wise man marry a girl who shows signs of an incipient beard, who has a masculine appearance, who has a grating voice, who is lean, who has the voice of a crow, whose eyes cannot be thoroughly closed, or who has round eyes. Let him not marry her, the calves of whose legs are covered with hair, or one whose ankles are ugly, or one whose cheeks show dimples when laughing. Let not a wise man marry a girl whose lustre is not soft; whose finger-nails are white, whose eyes are reddish, or whose hands and feet are large. Let not a man marry her who is too short or too tall, whose eye-brows are too close to each other, whose teeth show large gaps between them, or whose face is frightful. Let him not marry a girl whose heels are large, who has too much hair on her body, who is one of twins, whose teeth are brown, whose eyes-brows hang low, whose eyes are reddish brown. One must reject a girl who has no kindred, who is sickly from her birth, or is not descended of a good family. Let not one marry a girl who has too much of hair, or too little, whose complexion is either too dark or yellowish, who is born with an excess or deficiency of limbs, who is not pure, who has much hair, who is hump-backed or sickly, who is vicious or foul-tongued or who is an orphan." (5) *Satatapa*, says "A householder who marries a girl that has the voice of a flamingo, the colour of the cloud, and eyes yellowish like honey, prospers." (6) *Manu* thus lays down the necessity of marrying in the same caste, "she who is not a *sapinda* of his mother and does not belong to the same primitive stock (*gotra*) with his father and who has not had previous sexual intercourse, is eligible for marriage by a man of the twice-born classes." *Commentary*. The word *Amaithuni* means 'not previously subjected to sexual intercourse; The word *Asapinda* means 'not connected by particles of the same body.' The *sapinda* relationship is created by a connection by particles of the body; for instance, the son is related as a *sapinda* to his father as the son's body contains particles of the father's body, so with the paternal grandfather, &c. for the connection by particles of the same body is created through the father; so with the mother—by connection with the mother's body ;. so also with the maternal grandfather &c.—through the mother &c., so also with the mother's sister, the mother's brother &c. and with the father's brother and the father's sister &c.,

as the connection by particles of the same body exists; so also between husband and wife for they together make but one body; so also mutually between the wives of brothers for they make but one body with those who are derived from the same body. Thus the term *sapinda* wherever used must be understood as denoting connection by particles of the same body. (7) The existence of the connection by particles of the same body is made out by the *Srutis*. They say "one is born of himself" and "bring thyself forth in the form of your children." (8) Thus the *Garbhopanishad*. "This body is made of six *Kosas* (*sheaths*), three (derived) from the father and three from the mother; the breath, the tendon and the marrow from the father, the skin, the flesh, and the blood, from the mother. (9) *Apastamba* also says "you are born of yourself. Be born in thy issue.. He is born as his issue. The same man born of himself becomes a separate object of perception. If *sapinda* relationship depends upon the offering of rice balls during obsequies, then it will not exist in the maternal line or the brother's and the father's brother's &c." (10) *Vignaneswara* in his work says, that where a compound word as a whole has some fixed technical meaning given to it, the connotation of its different parts applicable in some particular cases must be neglected; but the *Smriti Chandrika*, on the other hand, holds that the *sapinda* relationship exists among all persons connected with the offering of rice balls during obsequies either as givers of the ball or receivers of it or as receivers of the wipings of the hand after the offering of the rice-balls. A *sloka* says ' The three ancestors from the fourth upwards receive the wipings of the hand: the three ancestors from the father upwards are receivers of rice-balls. The seventh from them downwards offers them the *pinda*; the *sapinda* relationship extends to seven degrees," so says the *smriti*. Nor could it be contended that if the existence of *sapinda* relationship were made to depend upon the offering of rice-balls during obsequies, it will not exist in the case of brother, father's brother &c.; for it is said that they are connected with this offering, they having to offer these to the same person or persons. *Sarvabhouma* says, that though by laying down that persons having to offer rice-balls to the same person or persons, are connected with the offering by any of them and are, therefore, related as *sapindas*, the *sapinda* relationship of brother, father's brother &c. is established, still the *sapinda* relationship of

daughter, sister, mother's brother and his daughter will be negatived as they are not thus connected in this offering of rice-balls, that, in consequence, the texts which prohibit marriage of a girl within five degrees on the mother's side will be rendered nugatory, and that therefore *sapinda* relationship is defined as stated in "The three ancestors &c." The saying of *Manu* that to the nearest *sapinda*, his (deceased's) property goes and the saying of *Goutama* that in default of sons, the *sapindas* of the deceased's mother and the disciples of the deceased shall have preferential rights to inheritance and the offering of oblations, respectively. The fear that if the *sapinda* relationship is made to depend upon connection by particles either directly or indirectly existing, then this relationship can be argued to exist between all persons in the whole world which has had no beginning must be removed by a reference to the text of *Manu* and others, (11) *Manu* says, "The *sapinda* relationship ceases with the seventh degree." (11) *Goutama* says, "a man of the second order should marry a wife who is of the same caste, who has not had previous sexual intercourse and who is younger than himself. Marriage can take place only between persons not having the same *pravara* and removed by relationship beyond seven degrees on the father's side, and by five degrees on the mother's side (13) *Sankha* says" let men marry wives not belonging to the stock derived from the same primitive guide, of the same caste, and not within seven and five degrees by relationship on the father's and the mother's side respectively. (14) *Vasishta* says "Let a man marry a wife who does not belong to the family descended from the same primitive guide, who has not had previous sexual intercourse, who is younger than himself and who is not related to him within five degrees on the mother's side and seven degrees on the father's side." (8) *Pathinasi* says "Let him not marry a girl though not belonging to the family descended from the same primitive guide, if she is related within five degrees from the mother's side or seven degrees on the father's side." (9) *Vishnu* says "Let men marry wives who have not the same *gotra* or *pravara* and related to him beyond five degrees on the mother's side and seven degrees on the father's side." (10) *Yagnavalkya* says "Let him whose life as bachelor is unsullied, marry a wife who possesses good qualities, who has not been enjoyed by another, who is beautiful, who is not his *sapinda*, who is younger than himself, who is

not suffering from any complaints, who has brothers and who does not belong to the family descended from the same primitive guide." *Apastamba* says "To whom the mind and the eyes adhere, in her (find) prosperity."

S. SITARAMA SASTRI.

NOTE ON CONSTRUCTIVE PAYMENTS UNDER S. 20 OF ACT XV OF 1877.

The object of the present article is to consider what payments are recognised by law for the purpose of preventing a debt from being barred. In ordinary parlance, the word payment means payment in money. If, for instance, A were to tell B that the debt due to him, or the interest due thereon, would be paid in a day or two, B would naturally expect payment to be made in the current coin of the realm. The business world on the contrary recognises various ways in which a debt may be discharged. For example, A, a dealer in indigo to whom B owes Rs. 10,000 on a promissory note bearing interest, may agree to take fifty maunds of indigo every year in lieu of interest; or he may agree to take five hundred maunds of indigo towards part payment of the amount due. In either of such cases, it cannot be said that payment has not been made to A of the interest or principal due to him. Again, there are also what are called book entries or book payments, whereby no actual payments are made, but are only taken to have been made by reason of entries in books of account. If, for instance, A owes money to B, and vice versa, they may agree that A should credit B in his accounts with the money due by him to B, as and for interest due by B. It may also be agreed that B should do the same with respect to interest due by A. Payments are also made by means of promissory notes, and bills of exchange drawn on the party indebted and accepted by him. In all these cases the question naturally arises:—How far are such payments recognised by S. 20 of Act XV of 1877; could A in the first of the series of examples given, sue on the promissory note after the expiry of three years and plead that there has been a payment of interest or part payment of principal, or could B in the second series of examples plead payment of interest by reason of the entries made in his books. The answer to these questions is not free from difficulty, and, can only be gathered from decided cases. The Acts of Parliment which relate to the question of payment are the statute of James I and Lord Tenderden's.

Act (IX George IV Ch 14 s 1). I shall deal separately with the various kinds of contructive payments recognised by law, and first, as to payment by bills of exchange and promissory notes.

The earliest reported case on the question of payment by bills is *Gowan* v. *Forster* 3 B & Ad, 507. This was an action in assumpsit in 1830, for repairs done by the plaintiff to the defendant's ship in 1818. The facts of the case are briefly these. The defendant and his brother Gorge Forster were joint owners of a ship. The plaintiff in the course of repairs done by him, received payments from time to time by bills drawn by him upon and accepted by George Forster. In February, 1822 these bills were dishonoured. The plaintiff paid them up and the defendant drew a bill at two months on the assignee of George who accepted the same. This bill was delivered to the plaintiff. Payment was actually made on the 31st March 1827. Lord Tenderden held that the delivery to the plaintiff of the bill in February 1822 operated as part payment sufficient to take the case out of the statute. The judgment in the case is very meagre, but nevertheless, it is sufficient authority for the proposition that payment could be made by bills of exchange. This principle of law was affirmed in the case of *Irving* v. *Veitch* 3 M & W, 90, and the following rule was laid down. "Where a debtor draws a bill of exchange to be applied in part payment of a debt and the bill is paid when due by the drawee to the creditor, it operates as part payment to defeat the statute, from the time of the delivery of the bill." The words "and the bill is paid by the drawee," seem to imply that the bill to operate as part payment must be paid when due; and this receives some support from the facts of the previous case. When once a fresh period of limitation runs from the date of the delivery of the bill, it is difficult to understand why the bill should also be paid up; and how such payment made at a later date could relate back to the date of delivery. A bill is conditional payment, and the immediate effect of its delivery is not to be affected by its operation as a payment being liable to be defeated at a future time, any more than the fact of coin by which payment is made turning out to be counterfeit, or a bank note by which the same is effected turning out to be a forgery. The intention and the act by which it is evinced are the same in all cases, and it is the intention of the parties which is alone to be considered. This point was discussed at great length by Lord Campbell C.J., in the case of *Turney* v. *Dodwell* 23 L. J, Exch 137, and it was held that the delivery of the bill operated as part payment from the date of delivery, although the bill subsequently turned out to be worthless. The law applicable to payments of bills of exchange would equally apply to payments by promissory

notes and other instruments. In the case of *Doming* v. *Antone* Bombay H, C, Printed Judgments 1889 p. 39 (referred to in Starling) it was held that the execution of a bond for interest due on a mortgage, is payment of interest. In the result, we find, that payment may be made by bills of exchange, promissory notes and other instruments, and that such payments operate from the date of delivery of the instruments.

Secondly as to payment by settlement of accounts.

That the settlement of an account between debtor and creditor could also operate as part payment of a debt by the former to the latter, was first recognised in the case of *Ashby* v. *James* 11 M & W 542. In this case the action was for money due for goods sold and delivered. At the trial it appeared that the greater part of the plaintiff's demand accrued due more than six years prior to the commencement of the action. The evidence relied upon by the plaintiff to take the case out of the statute was to the following effect. A short time before action, plaintiff and defendant met for the purpose of adjusting accounts. On the plaintiff's demand being read over, the defendant admitted its correctness but claimed a set off which was investigated and a balance struck in plaintiff's favour. Baron Alderson held "that the going through an account with items on both sides and striking a balance converts the set off into payment". What constitutes part payment in such cases is the striking of the balance, and not the mere existence in writing of cross demands. For it is by striking the balance that the parties agree that the lesser debt should go towards part payment of the larger one. See *Pott* v. *Clegg* 16 M & W 827. The case of *Amos & Amos* v. *Smith* 31 L. J., Exch 423 is also sufficient authority for the proposition that payment may also be made by way of settlement of account. In the words of Baron Martin, the test in all such cases is that "whatever is sufficient to prove a plea of payment is sufficient for this purpose." The words "in an action brought by the plaintiff against the defendant," have to be understood in order to make the words of the learned Baron clear. The existence of cross demands seems also to be essential in such cases, as will be seen from the case of *Ichha Dhanji* v. *Natha* I. L. R., 13 B, 338. In this case the facts were these. In 1874 the members of a certain community lodged a sum of money with the father of the defendant and opened an account with him. The money remained with the defendant's father at interest and the amount due for principle and interest was carried forward in his books every year to the credit of plaintiffs. This was done in the presence of the plaintiffs. The action was brought in 1883 for the recovery of the principal and interest due, and limitation was pleaded. *Sarjent C. J*

held, that there was nothing in the case which could be regarded as payment of interest and distinguished *Spargo's* case L. R., 8 Ch., App. 407 on the ground that there were no demands on both sides to set off against one another. *Spargo's* case was a decision under S. 25 of the English Companies Act (30 & 31 Vict C 131) and it was there held that "any *bona fide* transaction between a Company and a shareholder which, if the Company brought an action against him for calls, would support a plea of payment is "payment in cash" within the words of the section." The judgment of the learned Judge in the Bombay case is not very clear. It is difficult to understand how a transaction between creditor and debtor whereby they agree that the amount due for interest should be added to the principal and the whole amount carried forward in the creditor's books as being due for principal, is different from a transaction wherein the creditor receives actual payment of the amount due for interest and lends the same back again to the debtor. Applying the test laid down in *Sqargo's* case, such an agreement would be a complete defence in an action by the creditor against the debtor for arrears of interest due. The farce of actual money passing from the debtor to the creditor and back again to him is not necessary, as will be seen from the case of *Maber* v. *Maber* L. R., 2 Exch. 153. In this case after a debt due to plaintiff from his son had been barred, the plaintiff, his son, and his son's wife, had an interview at which the interest due was calculated. The plaintiff's son put his hand into his pocket, as if to pay it. The plaintiff stopped him, and writing a receipt for interest gave it to his son's wife as a present. No money actually passed between the parties. Martin, Channell and Pigott BB. held that the transaction was sufficient to take the case out of the statute. All the judges including Baron Bramwell held that "any fact which would prove a plea of payment of interest in an action brought to recover it, would be a payment sufficient to bar the statute. This test was approved by the Madras High Court in the case of *K. Pullamma* v. *M. Tatayya* I. L. R., 19 M, 340 wherein the Chief Justice and Mr. Justice *Benson* held that payment either of principal or interest need not necessarily be in money but may be by a settlement of account between the parties. Thirdly as to payment by delivery of goods.

The earliest reported case on this point is the case of *Hart* v. *Nash* 3 C., M & R. 337 wherein it was held that payment either of interest or principal need not necessarily be in money, but may be effected by the delivery of goods, agreed to be received by the creditor in liquidation of the debt. This case was approved and followed by Lord *Denman* C.J., in *Hooper* v. *Stephens* 4 Ad & El, 71, and he held that

"anything received by agreement, in reduction of a debt was sufficient payment to evade the statute." See also *Collinson* v. *Margesson* 27 L. J. Exch. 305. The case of *Narronji Bhimji* v. *Mugnirum Chandaji*, I. L. R., 6 B, 103, may be distinguished on the ground that in that case, there was no agreement between the creditor and debtor that the sale proceeds of the goods should go towards reduction of interest. The Madras High Court in *Pullamma* v. *Tatayya* also recognises delivery of goods as one mode of payment and accepts the test laid down in *Maber* v. *Maber* as applicable to this case also.

There are various other modes of payment recognised by the law of England. Thus the delivery of money by the debtor to a third person has been held sufficient part payment by the debtor to the creditor (see Banning p. 77, *Stamford, Spalding and Boston Banking Company* v. *Smith* L. R., 1892, 1 Q. B., 765). In *Bodger* v. *Arch* 10 Exch. 333, it was held that an agreement between the plaintiff and the defendant, whereby the defendant was to maintain the plaintiff's child in lieu of paying interest, was a sufficient part payment to take the case out of the statute. The tendency of the English cases is to give a very wide meaning to the word payment and Lord Campbel in *Turney* v. *Dodwell* 23 L. J., Exch. 137, seems to think that the word *payment* is simply a word borrowed by the law from the exchange.

To sum up briefly we find

(1.) That payment of interest or part payment of principal need not necessarily be in money.

(2.) That it may be effected by the delivery of goods, negotiable instruments, bonds &c., or even by mere settlement of account.

(3.) That all that is necessary is that the parties should agree that the result of their action should be the reduction of the debt, and that the test in all such cases is "would the transaction relied on, amount to a valid plea of payment either of interest or part of the principal in an action for the recovery of it." If so it would be. If not, not.

Before closing, I wish to say a few words about the last clause to S. 20. That clause seems to suppose that payment must be in money except in the case provided by it, and this view seems to receive some countenance at the hands of Mr. Mitra (see his Lectures). When the Legislature has expressly said that the receipt of the produce of mortgaged land by the mortgagee in possession, shall be deemed to be payment for the purpose of the section; and has studiously avoided to

mention other kinds of payment, it may be affirmed with some degree of force that all other kinds of payment are excluded. A glance at the section itself will make the matter clear. The section says that payment must be made either by the debtor or by some one on his behalf. When a mortgagee is in possession of mortgaged land and, at the request of the mortgagor, appropriates the rents and profits towards the interest due to him, payment is made to him by himself and not by the mortgagee or by any one on his behalf. In *Cockburn* v. *Edwards* L. R., 18 Ch. D. 449 and *Harlock* v. *Ashberry* L. R., 19 Ch. D 539, it was held that the receipt by the mortgagee of the rents and profits of the mortgaged property is not equivalent to the payment of interest or part payment of the principal; for such payment is not payment by the person liable to pay or his agent. This clause did not find a place in the Act of 1871, and in cases decided thereunder it was held that such receipt did not amount to payment. (See *Ummer Kutti* v. *Abdul Kader* I. L. R., 3 M, 57.) It is only to avoid this difficulty that the last clause has expressly been added by the Legislature.

C. V. VISVANATHA SASTRI.

NOTES OF INDIAN CASES.

Sankaran *v.* **Parvathi**, I. L. R., 19 M., 145. There is one point decided in this case which relates to the construction of section 43 of the Code. "If a plaintiff omit to sue in respect of, or intentionally relinquish any portion of his claim" says the Code, "he shall not afterwards sue in respect of the portion so omitted or relinquished." Intentional relinquishment is clear enough. But does a person omit to sue where he has no knowledge of the claim? The learned Judges answer in accordance with *Amboo* v. *Ketlilamma*, I. L. R., 14 M., 23, that it is not a case of omission. Where the facts giving rise to the claim are known, we fancy, the ignorance of law, which is the cause of the person not making the claim, is no ground for taking the case out of section 43. But where such facts are unknown, it seems reasonable to hold that it is not a case of omission. See *Amanat Bibi* v. *Imdad Husain*, 15, I. A., 106.

Ramasami *v.* **Streeramulu Chetti**, I. L. R., 19 M., 149. An application by the liquidator under section 214 of the Companies Act is certainly not a suit, and, therefore, the limitation provided by article 36 has no application. But, it appears to us that the English cases cited with regard to the position of a director being analogous to that of a trustee, have no bearing upon the case either. The only question is

whether article 178 has any application to the case. But it has been held inapplicable to applications which do not arise in suits pending or disposed of. If applications for probate or letters of administration, or for custody of minors under various enactments, do not fall within article 178 (*vide In re Ishan Chunder Roy*, I. L. R., 6 C. 707; *Bai Manekbai* v. *Manekji Kavasji*, I. L. R., 7 B, 213; *Rahamtullah Sahib* v. *Rama Rau*, I. L. R., 17 M., 373, etc.,), it seems proper to hold that the application by the official liquidator for the refund of moneys improperly paid by the directors is not barred by that article.

Paya Matathil Appu v. Kovamel Amina, I. L. R., 19 M., 151. It seems to us that the view of the Allahabad High Court in *Chuni* v. *Lala Ram*, I. L. R., 16 A. 5, is correct. It is not competent to a court of second appeal to add a person as party respondent who was no party to the appeal itself, though he was, it may be, a party to the original suit. Section 587 confers upon the court of second appeal the same powers as are possessed by the original court and the court of appeal. It follows from this that a person who was a party to the appeal might be added as a party respondent by the second appellate court, even though the appellant failed to make him a party. We do not mean to say that the final court of appeal may not direct the court of first appeal to make the person omitted a party to the record in that court, in order that full justice may be done between all parties in the court of last resort.

Arumugam Pillai v. Periyasami, I. L. R., 19 M., 160. We do not think that this decision is correct. A desire to do justice between the parties has oftentimes been the parent of bad law. The suit is for the redemption of a particular mortgage; the cause of action is based upon that; he cannot, failing to prove it, fall back upon an earlier mortgage either admitted or proved in the same suit. The decision in *Krishna Pillai* v. *Rangasami Pillai*, I. L. R., 18 M., 462, which is commented on and followed in *Sheo Prasad* v. *Lalit Kuar*, I. L. R., 18 A. 403, is correct, and the attempt to distinguish it, does not appear to us to have been successful. Because issues are raised as to the truth of earlier mortgages, the cause of action is not changed so as to entitle the plaintiff to fall back upon them. We are obliged to confess, the decisions in *Kunhi Kutty Nair* v. *Kunhamed Kutty Maraccar*, 4 M. H. C. (R.) 359, and *Unnian* v. *Rama*, I. L. R., 8 M., 415, do not appear to us to be correct.

Rajeswara Rao v. Hari Babandhu, I. L. R., 19 M., 162. In the case of a decree providing payment by instalments and on default of any one of the whole, there has been a conflict of decisions

as to whether by waiver, the decree-holder can give himself a longer period. In the case of contracts, and suits brought upon them, article 75 makes special provision. We are inclined to think that in the absence of any special language in article 179, a strict construction of the decree should be followed. See *Rattanchand* v. *Chugon Narrun*, I. L. R., 2 B, 356; *Shib Dat* v. *Kalka Prasad*, I. L. R., 2 A., 443.

The Secretary of State for India *v.* **Kota Bapanamma Garu,** I. L R., 19 M., 165. We do not understand the observations of the learned Judges, that article 149 of the Limitation Act applies only to suits brought by or on behalf of the Secretary of State. If the learned Judges mean that where the title of Government to a property is proved, a person suing for possession of property on the ground of title by adverse possession can succeed by showing 12 years' adverse possession, we think they are not right. If the Government has a sixty years' period within which they can sue to eject a trespasser, it follows that such person cannot acquire a title against it by anything short of the sixty years' period. The Limitation Act does not provide any rule of acquisitive prescription, and S. 28, which provides for extinctive prescription, has always been held to imply the acquisition of title by a person in whose favour the title of another is extinguished. So the period for acquisition of title by possession and the period for extinction are the same. It seems to us, therefore, that where the title of Government could not be extinguished, the period under article 149 not having elapsed, no title against it could be acquired within that period. We do not mean to say that where title is not proved, possession for any short period is not evidence of title, or, is not itself a basis for a possessory suit against a person who can show neither title nor possession. See *Gossain Dass Chunder* v. *Issur Chunder Nath*, I. L. R., 3 C., 224; *Radhabai* v. *Anantarao Bhagvant Deshpande*, I. L. R., 9 B., 198.

Kunhi Mamod *v.* **Kunhi Moidin,** I. L. R., 19 M., 176. We do not understand the facts of this case properly. The learned Judges observed that the property vested in the heir. So far as we can judge, there appears to be the payment of money for the renunciation of an expectancy. As an expectancy cannot be renounced and no property in it can pass, see section 6 of the Transfer of Property Act, clause A, the Courts below held the plaintiff entitled to recover. If the learned Judges are right in holding that the property vested in the heir, this decision would, of course, be right.

Queen-Empress *v.* **Bhashyam Chetti,** I. L. R., 19 M., 209. The reporter has evidently made a mistake in penning the head note of this case. There is nothing to show that the learned Judges held as a matter

of law, that an affidavit by the accused could not be admitted in revision in disproof of a recorded plea of guilty in the court below. All that they meant to say, and we may add, that they did say, was that the affidavit was insufficient to induce them to suppose that the record was incorrect.

Alagappa Mudaliar *v.* Sivarama Sundara Mudaliar, I. L. R., 19 M., 211. There may be an agreement for partition as distinguished from a deed of partition, just as there may be an agreement to sell as distinguished from a sale; and it is as absurd to say that there is no completed agreement to partition, because a deed of partition has not been executed, as it would be to say that there is no completed agreement to sell, because the deed of sale has not been executed. The case of *Ridgway* v. *Wharton* 6, H. L. C., 238, was misapplied by the court below. An agreement to divide is a legal transaction which is complete when the parties have agreed upon the terms, and although there may be a doubt whether such a transaction has become complete, where the agreement itself is intended to be embodied in a formal document, it does not cease to be a complete contract, because the contract has not developed into the stage of mutual conveyances involved in a deed of partition. The learned Judges are also right in holding that where there is a sale of two items for one consideration, and the sale as regards one is illegal, it is open to the purchaser, to take the item, the sale of which is legal in return for the whole consideration, though he may not be entitled to ask the Court to split the amount of the consideration.

Narayana Kothan *v.* Kalyana Sundaram Pillai I. L. R., 19 M, 219. We are disposed to agree with the view adopted by *Subrahmania Aiyar, J.* that it is only an irregularity in the conduct of a sale that the judgement-debtor adjudged a lunatic prior to execution proceedings, was not represented by a guardian. Where the sale has been confirmed notwithstanding such irregularity without the proceedings being set aside by means of an application under S. 311, the sale appears to us to be good. We are unable to agree in the view of *Best, J.* that a sale under these circumstances stand on the same footing as where execution is had against the property of the judgment-debtor after his death without his representative being on the record. Unless there is fraud giving rise to a cause of action for the recovery of the property, it appears to us that notice to the purchaser of the irregularity of the proceedings cannot vitiate the sale. Both the Judges agreed in calling for certain findings as to substantial injury and the presence or absence of *bona fides* in the purchaser, which appear to us to have been unnecessary.

Rama Ayyan *v.* Srinivasa Pattar, I. L. R, 19, M, 230. The decision in this case appears to us to be questionable. There was a

decree unsatisfied, no satisfaction having been entered upon the record. The decree was transferred to a man who had agreed for a consideration received from the judgment-debtor, to satisfy the decree. Does this agreement preclude him from applying for execution of the decree.

It may be regarded as unjust that he should do so. As between the transferor, the decree-holder, and the transferee, there was a valid assignment of the decree. Does the assignment cease to be valid because there is an agreement by the transferee prior to the transfer to satisfy the decree. The decree subsisting, and the transfer being good, it appears to us that the application for execution by the transferee must be granted. The judgment-debtor may have an action for breach of the agreement. If the transferee has been placed on the record, we think, the agreement referred to is no bar to the application.

Velu Pandaram *v.* **Gnana Sambanda Pandara Sannadhi,** I.L.R., 19 M, 243. The decision in this case appears to us to be erroneous. A trustee of a religious endowment alienates his office and with the office, the right of management of the properties attached to it. The Privy Council has held that unless he sues within 12 years from the date of the alienation, his right to recover the office is barred. Supposing he dies, the question arises whether his successor has a right of action within 12 years from the date of his succession. Suppose again the successor dies, can any subsequent claimant of the office sue within 12 years from the date of accrual of his right to succeed. As regards the second question, it seems to us clear that if the alienee held the office adversely to the first successor, his possession is adverse to the second as well and that he cannot count 12 years from the date of accrual of his right to succeed. The principle of the decisions of the Privy Council as regards possession adverse to a widow being adverse to a reversioner, would hold good, and even in England, where possession is adverse to the tenant in tail, the remainderman is barred likewise. If the learned Judges are right, it would follow that the hundreth person in order of succession might claim the properties within 12 years from the date of his right of succession opening. As regards the first question even, it may be that as the alienor would have a right of action at the moment of the alienation itself, limitation would run against the successor also from the date of the alienation.

SUMMARY OF RECENT CASES.

Arjun Ramchandra Shet Karpe *v.* **Shankar Vishram Shenvi Ghuraya.**

It is undesirable to have a case disposed of without hearing the evidence of all the witnesses whom the parties desire to call.

Where after the evidence called by the plaintiff had been taken, the Subordinate Judge intimated to the parties, that having regard to the view which he took of that evidence, he did not think it necessary to examine all the witnesses for the defendant, and dismissed the suit, and the lower appellate Court on that evidence reversed the decree and awarded the claim.

Held :—That when the Judge in appeal was inclined to take a different view of the effect of the plaintiff's evidence, he ought to have given the defendant an opportunity of calling the evidence which the Subordinate Judge in effect declined to take.—*Printed Judgments of the B. H. C.*

Official President of Municipality—Defamation.

Gopaul Janardhan Bhatkhande *v.* Mahadev Ramchandra Nadkarni.

A Huzur Deputy Collector was appointed by Government, president of a District Municipality, and as such president, he made a report to the Collector containing statements which were found to be defamatory and malicious. *Held* that the fact that Government appointed one of its officers to be president did not make him *qua* president, an officer of Government. *Held* also that S, 48 of the Bombay District Municipality Act, II of 1884, did not apply to the case, as the malice was found to be individual, and the suit was brought against the defendant as an individual.—*Printed Judgments of the B. H. C.*

Jurisdiction—Mofussil Small Cause Court.

Fulchand Umedram *v.* Nathmal Mulchand.

Where in a suit for damages instituted in a Mofussil Small Cause Court, the sum which the plaint alleged to be due to the plaintiff exceeded the pecuniary jurisdiction of the Court, but was reduced to the amount claimed, which was within jurisdiction, by setting off with out defendant's consent, a sum due to them by the plaintiff upon another transaction.

Held, that as the plaintiff had no right without the defendant's consent to mix up the two separate cross demands, the Court had no jurisdiction to entertain the suit.—*Printed Judgments of the B. H. C.*

Joint family property, Suit for a share in—Onus of proof—Title—Exclusion.

Jivanbhat bin Narharbhat Joshi *v.* **Anibhat bin Govindbhat Joshi.**

Where, in a suit to enforce a right to a share in joint family property the defendants pleaded that the plaintiff belongs to a branch of their family which separated more than 30 years ago, it is necessary for the plaintiff to prove that the property is joint. But, when this proof is given, the *onus* does not lie on him, of proving possession within 12 years of suit, but on the defendants of proving exclusion known to him. —*Printed Judgments of the B. H. C.*

Adoption by widow—Co-widow.

Bhinuva Kom Ramangavda *v.* **Sangawa Kom Ramangavda.**

An adoption is not valid merely because it was effected by a widow with a desire to defeat the claim of her junior co-widow to a share in her husband's property.—*Printed Judgments of the B. H. C.*

In re **Ramchaddas Nagardas**;—

A Sessions Judge granted sanction for the prosecution of a pleader for presenting, on behalf of his client, a document, merely on the ground that it wore on its face such marks of its being a fabricated document that the pleader's suspicions must have been aroused at the first sight of it, and that he ought to have strictly examined it, and had he done so, he would either have rejected it, or advised his client, to produce it in Court on his own risk or responsibility. *Held*, on an application for revision, that a pleader is under no higher obligation than any other agent, and to justify his prosecution for offences under S. 196, 471 and 109 of the Indian Penal Code, in connection with a document presented by him on behalf of his client, it must be shown that he was a party (principal or accessory) to the concoction of the document and had the knowledge that it was concocted. The mere fact that his suspicions ought to have been aroused by the sight of the document is not *prima facie* evidence that he knew or had reason to believe the document to be forged. The words in S. 471 of the Indian Penal Code "knows or has reason to believe" are of general application and the allegation must be proved as strictly in his case as in the case of any one else.—*Printed Judgments of the B. H. C.*

Donatio Mortis causa.

Cain v. Moon. [1896 II Q. B. p. 283.]

Three things must combine to constitute an effectual *donatio mortis causa*; first, the gift or donation must have been in contemplation, though not necessarily in expectation of death; secondly, there must have been delivery to the donee of the subject matter of the gift; and thirdly, the gift should have been made in such circumstances as show that the thing should revert to the donor in case he should recover.

The plaintiff sued to recover a bank note of the value of 50£ from the defendant as being the property of his deceased wife. The defendant resisted the suit on the ground that the deceased had made a *donatio mortis causa* to her of the note. The deceased was very ill in 1893, and the defendant who was her mother had attended on her during her illness and had treated her with great kindness. After her recovery from this illness, the deceased gave the note to the defendant and asked her to keep it and not to part with it to anybody else. Again she fell ill in 1895; and on the 30th September 1895 when the defendant visited her, she said she could not live and referring to the note she said " every thing that I possess and the bank-note is for you if I die." She died on the 3rd October next; *held*, that under these circumstances there was a valid *donatio mortis causa*.

Bequests—Charity—Philanthropy—Benevolence.

In re **Macduff. Macduff v. Macduff** [1896 II. Ch. D. 451 C. A.]

A testator bequeathed some property in the following words. " I. J. R. M., will from my estate the entire sum of £ 10,000, to be appropriated and allocated for some one or more purposes, charitable, philanthropic or——"

Held.—That the bequest was not a good charitable bequest as being indefinite,—not because of the blank in the will, but because the will contemplated purposes which were not only charitable but also philanthropic.

Per. Rigby L. J.—It is not a good charitable gift if there is any alternative allowed to the trusties as to whether the purposes to which they apply the property which is devised to them are to be charitable or something else. If there is an alternative, the general rule comes in, that this is a matter too indefinite for the court to give effect to it."

Once more the question, what is a charitable gift, arose, in this case before the Court of Appeal. But their Lordships have again declined to

define a charity on account of the difficulty of defining it. But the matter underwent a thorough discussion in the case and the distinction between a charitable, a philanthropic and a benevolent gift was pointed out though not to the extent of enabling a clear definition of a charity to be given. Benevolence indicates good will towards a particular individual or particular individuals. Philanthropy is benevolence towards mankind in general. About charitable gifts the following are the only limitations that can be definitely laid down:—(1) All charitable gifts are philanthropic. (2) A gift which excludes the poor would not be charitable (3) All trusts for religious purposes are charitable.

Ibrahimbhai Valad Hassanbhai *v.* W. M. Fletcher.

The right to specific performance of a contract, or, in the alternative, to a return of the earnest money should be determined in one and the same suit, and the plaintiff, failing to obtain a decree for specific performance should not be driven to a separate suit to recover back his deposit, if he is entitled to relief in that form.

The circumstance that a purchaser is not entitled to specific performance is by no means conclusive against his right to a return of the deposit. If having regard to the terms of the contract, he is justified in refusing to accept the title which the vendor is able to give, he is entitled to a refund of the deposit.—*Printed Judgments of the B. H. C.*

Krishna Ramaya Naik *v.* Vasudev Venkatesh Pai and Vasudev Venkatesh Pai *v.* Mhasti bin Naik—

Although there is no presumption that moneys borrowed by the manager of a Hindu family are borrowed for family purposes, and a plaintiff seeking to make the family property liable must prove that the loans were contracted for the family, it is not incumbent on the plaintiff to show in respect of each item in a long series of borrowings the particular purpose for which it is borrowed. It will be sufficient for him to show that the family was in chronic need of money for the current outgoings of the family life, or its trade necessities and that the moneys were advanced on the representation of the manager that they were needed for such objects. And if the fair inference to be drawn from all the circumstances of the case leaves no doubt that the moneys were borrowed for family reasons, the plaintiff is entitled to succeed although he is not able to indicate the particular purpose for which each sum has been borrowed.

Where mortgage bonds were passed for debts due on decrees, and the execution of the bonds (which has been sanctioned by the Court)

and the amounts for which they were passed, which in the aggregate exceeded the amount of the decrees, were certified to the Court and the Court recorded the adjustment without objection, and the decrees by reason of such certified and recorded adjustment became incapable of execution :—

Held that sufficient has been done by the Court to satisfy the requirements of Section 257, A of the Code of Civil Procedure.—*Printed Judgments of the B. H. C.*

Gurulingappa Satwirappa Gidwir v. Nandappa Chanbasappa Solapuri.

Alienation by a Hindu coparcener—Alienor's death, effect of, on alienee —Death or birth of other coparceners after alienation, effect of.

Held (1) That a Hindu coparcener by an alienation of his rights in part or the whole of the joint family property does not place the purchaser of such rights in his own position—does not confer upon him the *status* of an undivided Hindu.

(2) That such an alienation before partition does not deprive the alienating coparcener of his rights in the Hindu joint family. If the alienation of his rights in each individual portion of the joint family property has not that effect, the fact that it is the last item which is being alienated cannot alter the position. The purchaser of the last bit of the property of the coparcener cannot be in a better or worse position than the purchaser of the penultimate portion.

(3) That as the purchaser does not by the death of his vendor lose his right to a partition, so his position is not improved by the death of other coparceners before partition.

(4) That he stands in no better position than his alienor and consequently like the latter is liable to have his share diminished, before partition by the birth of other coparceners if he stands by and does not insist on an immediate partition.

Rangasami v. Krishnayyan (I. L. R., 14 M. 408). *Pandurang v. Bhaskar* (11, B. H. C. R., 12). *Mahabalaya v. Timaya* (12, B. H. C. R., 139). *Ballabh Das v. Sundar Das* (I. L. R. 1., A. M. 429) referred to. —*Printed Judgments of the B. H. C.*

Dattaji Sakharam Rajadhiksh v. Kalba Yese Prabhu Gadekar.

A Hindu widow is not a mere tenant for life. She is invested with a fuller estate and more ample powers of management, and a lease

granted by her at a fair rent, though for a long term of years does not necessarily determine at her death. It is voidable, not void on her death. The heir coming in after her has to show that in granting it she has exceeded her power. If he is guilty of lying by under such circumstances as to induce the belief that the lease will be treated as binding, he cannot call upon the lessee again to pay that rent which the latter has *bona fide* paid to the widow's agent; and, in setting aside the lease must compensate him for the money properly expended by him in improving the property.—*Printed Judgments of the B. H. C.*

In re **James Fitzgerald**:—A Criminal Court has no right to tell the pleader to sit down in the middle of his cross-examination because he is asking irrelevant questions. It can only rule a particular question irrelevant, and refuse to allow it to be put, and order the pleader to proceed with another question. It has no right to refuse to allow the pleader to cross-examine some witnesses, because he has not purged himself of the contempt shewn towards it, or to allow him to cross-examine witnesses thereafter called, only if he apologised for his previous contumacious behaviour. The Court has no power to tell the accused, who has a right to be defended by a pleader of his choice, to engage another pleader, as the pleader already engaged by him did not know how to behave in Court.—*Printed Judgments of the B. H. C.*

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Educational Review for October 1896 (*in exchange*).

Green Bag for September and October 1896 (*in exchange*).

Allahabad Weekly Notes for Sept. and Octr. 1896 (*in exchange*).

The Canadian Law Times for September 1896 (*in exchange*).

The Albany Law Journal for September 1896 (*in exchange*).

The American Law Review for Sept.—Oct. 1896 (*in exchange*).

The Law Digest and Recorder for Sept. and Octr. 1896 (*in echange*).

A Frolic of Lord Thurlow.—Returning by way of frolic, very late at night, on horseback, to Wimbledon, from Addiscombe, the seat of Mr. Jenkinson, near Croydon, where the party had dined, Lord Thurlow, then Chancellor, Pitt, and Dundas, found the turnpike-gate situate

between Footing and Streatham, thrown open. Being elevated above their usual prudence and having no servant near them, they passed through the gate at a brisk pace, without stopping to pay the toll, regardless of the remonstrances or threats of the turnpike man, who running after them whom he thought to belong to some big highway men, who recently committed some depredations on that road, discharged the contents of his blunder buss at their backs. Happily he did no injury.—*Wraxall's Memoirs of his own times.*

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Lord Mansfield's retirement from the Bench.—On his Lordship's resignation, the following letter was sent to him, signed by all the Counsel of the King's Bench bar, who had practised in that Court during his administration.

"*To the Earl of Mansfield.*"

"MY LORD.

"It was our wish to have waited personally on your Lordship in a body, to have taken our public leave of you on your retiring from the office of Chief Justice of England; but judging of your Lordship's feelings by our own and considering, besides, that our numbers might be inconvenient, we desire in this manner affectionately to assure your Lordship, that we regret with a just sensibility, the loss of a magistrate whose conspicuous and exalted talents conferred dignity upon the profession, whose enlightened and regular administration of justice made its duties less difficult and laborious and whose manners rendered him pleasant and respectable.

"But while we lament our loss, we remember with peculiar satisfaction, that your Lordship is not cut off from us by the sudden stroke of painful distemper, or the more distressing ebb of those extraordinary faculties which have so long distinguished you amongst men ; but that it has pleased GOD to allow to the evening of an useful and illustrious life the purest enjoyments which nature has ever allotted to it, the unclouded reflections of a superior and unclouded mind over its varied events, and the happy consciousness that it has been faithfully and eminently devoted to the highest duties of human society in the most distinguished nation upon earth.

"May the season of this high satisfaction bear its proportion to the lengthened days of your activity and strength." (Signed).

The letter, thus signed was transmitted to Lord Mansfield by Mr. Erskine, at the desire of Mr. Bearcroft, the senior of the King's

Bench bar, and the other subscribers, when His Lordship returned by the servant the following answer.

"*To the Honourable T. Erskine, Sergeant's Inn.*"

"DEAR SIR,

"I cannot but be extremely flattered by the letter which I this moment have the honour to receive.

"If I have given satisfaction, it is owing to the learning and candour of the bar; the liberality and integrity of their practice freed the judicial investigation of truth and justice from difficulties. The memory of the assistance I have received from them, and the deep impression which the extraordinary mark they have now given me of their approbation and affection has made on my mind, will be a source of perpetual consolation in my decline of life, under the pressure of bodily infirmities, which made it my duty to retire.

I am,

Dear Sir,

With gratitude to you and the other gentlemen,

Your most,

Affectionate and obliged humble servant,

"MANSFIELD,"

"CAEN-WOOD, 18*th June*, 1788."

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Lord Ellenborough.—When Lord Ellenborough was Attorney-General, he was listening with some impatience to the Judgment of a learned Judge; afterwards his colleague who said in———*v.*———, "I ruled that, etc., "You rule," said the Attorney-General in a tone of suppressed indignation, loud enough to be heard, however, by many of his brethren of the bar. You rule! You were never fit to rule anything but a copy book.

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Lord Avonmore and Curran.—Lord Avonmore was one of the brightest ornaments of his country; to a masculine understanding, immense capacity, great and profound learning, he added a powerful wit and an overwhelming eloquence. His wit, though not so frequently exercised as Mr. Curran's, was yet a gem by the first water. A great susceptibility in his temperament subjected him to great gusts of impatience. Mr. Curran, with intent to cure his friend of this imperfection and also

to relieve himself from its effects, coming one day rather late to dinner, to shelter himself from the storm which he found gathering about him, observed on entering the room that he was delayed by a melancholy circumstance which took place in Clarendon Market, through which he was passing. It was a butcher and a child, the butcher had a bloody knife. Lord Avonmore could not be patient; his extreme feeling took the alarm, 'What,' he exclaimed 'MY GOD,'! has the villain murdered the child? Oh! Good Heavens! His feelings so wound up that he by this dreadful anticipation had neither eye nor ear. He at length perceived a laugh in the room and looking at Mr. Curran, 'What' did you not say that the butcher had stabbed the infant to the heart? 'No,' My Lord I said he plunched the bloody blade into the throat of a pig.'"—*O' Regan's Memoirs of Curran.*

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Poetical Wills.—The following Poetical Wills are said to have been proved in the Prerogative Court of Canterbury.

The fifth day of May,
Being airy and gay,
And to hyp not inclined,
But of vigorous mind,
And my body in health,
I'll dispose of my wealth,
And all I'm to leave,
On this side the grave,
To some one or other,
And, I think to my brother,
Because I foresaw,
That my Brother-in-law,
If I did not take care,
Would come in for a share,
Which I no wise intended,
'Till their manners are mended,
And of that, GOD knows, there's no sign,
I do therefore enjoin,
And do strictly command,
Of which witness my hand,
That nought I have got,
Be brought into hotch-pot;
But I give and devise,
As much as in me lies,

To the son of my mother,
My own dear brother,
To have and to hold,
All my silver and gold,
As the affectionate pledges,
Of his brother.

JOHN HEDGES.

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" *Sir Thomas More.*—When the Counsel of the party pressed him for a longer day to perform the decree, said, 'Take Saint Barnaby's Day, which is the longest day in the year.' Now Saint Barnaby's day was within a few days following."

Bacon's Apothegms.

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Unprofessional Conduct in Lawyers ;--In a case instituted by the Fairfield county bar, to disbar one Taylor for unprofessional conduct, Chief Justice Andrews, of the Supreme Court of Errors, in Connecticut, concludes his judgment as follows:

" It is not enough for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices. If he so conducts his profession that he does not deserve that confidence, he is no longer an aid to the court, nor a guide to his clients. A lawyer needs, indeed, to be learned. It would be well if he could be learned in all the learning of the schools. There is nothing to which the ingenuity of man has been turned that may not become the subject of his inquiries. Then, of course, he must be especially skilled in the books and the rules of his own profession. He must have prudence and tact to use his learning and foresight and industry and courage. But all these may exist in a moderate degree, and yet he may be a creditable and useful member of the profession, so long as the practice is to him a clean and honest function. But possessing all these faculties, if once the practice becomes to him a mere "brawl for hire," or a system of legal plunder where craft and not conscience is the rule, and where falsehood and not truth are the means by which to gain his ends, then he forfeits the right to be an officer in any court of justice or to be numbered among the members of an honorable profession.—*The Albany Law Journal.*

The Judiciary.—A very excellent address was delivered by Hon. J. F. Follett at the recent meeting of the Ohio State Bar Association on the 15th of this month. The expressions of the distinguished lawyer on the subject of "The Judiciary" are worthy of careful consideration, because of their practical value and because they are gathered from actual experience at the bar.

On the subject of "The Judiciary" Mr. Follett said:

"An honest, fearless, able, patriotic, incorrupt and incorruptible judiciary is the best possible conservator of individual rights, of public order and safety, the surest preserver of the benefits and blessings of free institutions and constitutional government, and the most reliable protector of the weak and defenseless against the aggressions of the strong and the encroachment of the powerful. In the establishment and maintenance of such a judiciary, each member of society and every class in the community is interested, but none are so deeply interested as are the members of the bar. The business of the lawyer; not only compels him to come into closest relations with the judiciary, but all his professional acts are subject to its investigation and scrutiny. In all civilized countries, and especially in free governments like ours, the immense power necessarily conferred upon the judiciary, as the conservative and preservative department of the government, emphasizes the importance of the exercise of the highest wisdom in the selection of men fitted for a trust so sacred. None can realize more perfectly or feel more deeply than do members of the bar, the great wrong done to society and to its individual members by wrong adjudications, by misconceptions of the law and improper application of legal principles by those who have, without proper qualification, been vested with so high, important and sacred a trust as that of judge.

"It is natural that we should feel chagrined and personally humiliated, when we go into court to present a case which we have carefully examined and which we know to be thoroughly on the line of well-settled principles of law, and settled by well considered adjudication, and hear from one who has attained the position of judge, but is entirely innocent of any knowledge of the law, and burdened with none of the requisite qualifications for that high office, that we are mistaken and find ourselves unceremoniously turned out of court, carrying with us an overpowering sense of weakness and inability to protect the legal rights of our clients, or to enforce the legal possibilities of those against whom we have had the temerity to institute proceedings in court.—*The Albany Law Journal.*

We fear such a state of things is not confined only to Ohio.

Telegraph Libels.—An interesting case in regard to telegraph libels has been decided by the Supreme Court of Minnesota in the case of *Peterson* v. *Western Union Tel. Co.*, 67 N. W. Rep. 646. It seems that the defendants received a message at its office in New Ulm directed to the plaintiff at St. Paul of which the following is a copy: "Slippery Sam, your name is pants. (Signed) Many Republicans."

The defendant company forwarded the message to the plaintiff at St. Paul and the operator there placed it in a sealed envelope and caused it to be delivered to the plaintiff. The court holds that the message on its face was susceptible of a libelous meaning and that the evidence was sufficient to justify a finding by the jury that the defendant maliciously published a libel. The opinion of the court upon this point is as follows:

"The message was on its face, fairly susceptible of a libelous meaning. The sting is in the word 'slippery.' This word, when used as descriptive of a person, has a well understood meaning. It means when so used, that the person to whom it is applied can not be depended on or trusted; that he is dishonest, and apt to play one false. (Cent. Dict.) If such is the meaning of the word as used in this message—and of this the jury were the judges—it was clearly libelous, because if a man is dishonest, and apt to play one false, he merits the scorn and contempt of all honorable men. To falsely publish of a man that he is slippery tends to render him odious and contemptible. Such a publication is a libel. (*Wilkes* v. *Shields* [Minn.], 64 N. W. 921). The question whether or not the defendant maliciously published the libel is one of some doubt, but we are of the opinion that it was a question for the jury, under the evidence. Technically, the defendant published the libel when it communicated it to its operator at St. Paul, but whether such publication was wrongful (that is actionable) depends on the further question whether or not it was privileged.

The defendant was a common carrier, and was bound to transmit all proper messages delivered to it for that purpose, but it was not bound to send indecent or libelous communications. Where a proffered message is not mainfestly a libel, or susceptible of a libelous meaning, on its face, and is forwarded in good faith by the operator, the defendant can not be held to have maliciously published a libel, although the message subsequently proves to be such in fact. In such a case the operator can not wait to consult a lawyer, or forward the message to the principal office for instruction. He must decide it promptly, and forward the message without delay, if it is a proper one, and for any honest error of

judgment in the premises the telegraph company cannot be held responsible. But where the message, on its face, is clearly susceptible of a libelous meaning, is not signed by any responsible person, and there is no reason to believe that it is a cipher message, and it is forwarded under such circumstances as to warrant the jury in finding that the operator, in sending the message, was negligent or wanting in good faith in the premises, the company may be held to have maliciously published the libel. A publication under such circumstances is not privileged. The evidence in this case was such that a finding either way on the question whether the defendant maliciously published this libel would not be disturbed by the court".—*The Albany Law Journal.*

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"*National Alliance for the Relief of the French Revolution.*":—A very remarkable company has been started in France, whose object is to increase the population. The organizers are Dr. Jacques Bertillon, Chief of the Bureau of Statistics of Paris, M. Charles Richet, Professor of the Faculty of Medicine in Paris, and Dr. Juval, a member of the Faculty of Medicine. The persons have noticed, with deep regret, that the population of France was not increasing proportionately with that of other countries and now they come forward with what they believe to be an infalliable remedy for this evil, and which is chiefly interesting because of the means sought to be employed to bring about the result.

It seems that one hundred years ago the great country of Europe, that is, the great powers, contained 98,000,000 inhabitants, of which 26,000,000, or 27 per cent., were residents of France. To-day, these same countries contain 300,000,000 inhabitants of which 38,000,000, or only 12 per cent. live in France. Dr. Bertillon claims that these figures speak for themselves, and that if the births continue to decrease at the same ominous rate, France, formerly one of the most powerful countries in Europe, will become one of the weakest. The men interested in this matter have formed a Society which is called "The National Alliance for the Relief of the French Revolution." The plans are (1) to try to have the laws relating to inheritance greatly modified ; (2) to get taxes removed from those families which have more than three children, and (3) to have the laws relating to succession duties reformed.

It is apparent that the public treasury will be seriously affected by the removal of taxes in the case of families having more than three children; so it is proposed to place a tax of one-fifth of one per cent. on those families which are childless, or have only one or two children.

There are said to be excellent reasons for these proposed reforms. The larger a man's family is in France, we are told, the more he is taxed, both directly or indirectly, the result being that thrifty parents do not care to have many children. Moreover, the parent's property must be divided among the children, and if the children are numerous and the property small, the disastrous results can easily be foreseen. In other countries the law of entail is maintained pretty rigidly, and, though its operation seems hardly equitable or natural as regards younger children, it certainly seems to act in some degree as a preventive of depopulation.

"Remove all burdensome taxes from fruitful families" say the members of the National Alliance, "and let Frenchwomen and Frenchmen know that, even from a monetary point of view, it will be fortunate for them to have many children. Then, as the national treasury must be supported, let us tax those parents who have few or no children. Parents who have no children or only one or two children may reasonably be required to contribute a goodly quota toward the support of the state, whereas it is improper and unjust to expect any support from those parents who have to provide for numerous children. Do this, and France will soon become, as she was in the past, one of the greatest powers in Europe; fail to do this and France will soon sink to the level of Denmark, Belgium or Holland.

The members of the Alliance intend to hold several public meetings and to publish several pamphlets setting forth their views. They offer membership to all who care to assist them, irrespective of creed or political opinions. Many persons throughout France have already announced their adhesion to the programme of the Alliance, and it is confidently expected that in the near future the necessary bills in regard to succession duties and the abolition of taxes will be presented to the French legislature. What the result will be cannot be foretold, but Dr. Bertillon and his colleagues are confident that their appeal to French patriotism will not be in vain.—*The Albany Law Journal.*

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The Young Lawyer in Court:—There is no profession in which so much depends upon making a good impression as in the practice of the law. Almost everything depends upon this. It is better to make a good impression for one minute than an indifferent one for an hour, and a bad impression is most always disastrous, and a good or bad impression is often due to some trivial thing.

The first minute that I should have a young lawyer make as to how to best make a good impression either on the court or jury is that he

must look to his personal appearance. An ill-shaven face and an unkempt head of hair never make a good impression anywhere expect on a foot-ball field.

A soiled and unkempt appearance does not tend to make a good impression. Personal appearance, even though it does not attract, should never repel. Physical beauty is not necessary to make a good impression, The homeliest men are often the most interesting looking. You didn't make your face, but you are placed in charge of it, and you ought to give it a fair chance.

There is no excuse for appearing disorderly. Very few men can look artistically disorderly, and my advice would be that you do not attempt the task of assuming an artistic air of disorder. You had better stick to the plain rule and believe that "cleanliness is next to Godliness". even in a lawyer, and that by cleanliness he can probably get nearer to being Godly than in any other way when pursuing his profession.

Do not imagine that in order to make a good impression you must necessarily raise long hair. You may attract attention and curiosity, but you can depend upon it that if what you do about your personal appearance attracts attention, it is seldom to your advantage.

I remember a certain member of the bar who started out to practise law and raise his hair at the same time. His hair grew but his practice did not, and it was of him that a certain witty member of the bar said: "He's all front door, and when you open the front door you are right in the back yard."

Next I would have you make a minute of the fact that in order the Court may know or that the jury may hear, you may speak so that you can be understood by both. It does not follow that because your voice is sufficiently loud so that you can be heard when asking for a sandwich across a lunch counter, that the Court can understand you. If you have a voice that makes one think of the sign in the street cars, "Frog in the throat? 10 C," either repair that voice or give up the practice of law. Be a barber and then you will not have to talk. An otherwise good argument can be very badly spoiled by an improper delivery. It is not necessary that you should have the voice of a Webster, but it is absolutely necessary that you should be able to speak so that what you say can be readily understood.

Remember that although the Judge is paid by the County to listen to lawyers, and that he cannot refuse to listen to you, he is not bound for the salary he gets to hear what you say, and if he does not you can hardly expect much at his hands, either favourable or unfavourable;

and in no case can you expect to make a good impression, even if you do not make a bad one.

Your mother may think you have a good voice, and the dear woman thinks she is right; but remember that your mother is the poorest judge of any of the many good and bad qualities that you have.

Next, I would have you make a minute of the fact that you had better not go to the other extreme and imagine, when you are addressing an old settlers' meeting on the fair grounds. Because your aunt that was deaf thought that you had a very fine voice, and therefore, ought to be a preacher or a lawyer, so that you might make use of your voice, does not make it necessary for you to exercise that voice to the fullest extent on every slight occasion. If you are fortunate enough to possess a strong, loud voice, you have then the very best material with which to provide yourself with the faculty of being always and under all circumstances understood, but use your voice with judgment and not in such a way as to make an unpleasant impression. Remember that sound is not sense.

We frequently see men that remind us of the story, that was told by Abraham Lincoln, of the Steamer on the Ohio River that had a four foot boiler and a five foot whistle, and every time they blew the whistle they had to stop the boat.

One other little minute and I close. When you intend to appear in Court, prepare what you intend to speak about, so that it is familiar to you. Think about it. It is better to think much and say little than to think little and say much. A shot gun makes more noise and covers more space in one charge than a rifle, but the shot does not go so far, so swift, nor so deep, Although the judge is paid by the day and not by the piece, it is not necessary that you should make it your business to keep him busy. It is barely possible that he might do some work if it didn't take you so long to tell him so little. You might lay yourself open to the charge of having a flint lock brain with a hair trigger mouth. Remember, to do all things for a reason, and with reason. Appear well, speak plainly and to the point.—*Chicago Law Journal.*

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A peculiar marriage ceremony took place some days ago south of Franklin, Ind. Franklin Cordroy and Ada Shoemaker were granted license to marry by Clerk Byfield and they applied to Squire Taylor of Brown County to tie the knot. The Squire doubted his right to perform a ceremony outside of his own county and was equally sure that there would be nothing legal were the young people married outside

of the county in which they procured a license. The Squire's fertile mind soon solved the difficulty, however, and a rig was procured. Driving to the county line the Squire took his stand in his own county and the couple in Johnson county and the ceremony was performed.—*Chicago Law Journal.*

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One Lawyer's Way of Advertising:—There are a good many methods to gain notriety, but the most original one, among the Bar of an Eastern City is for a man to buy a box at a theatric and send one of his menials into a cheaper part of the house so that the latter can call attention to his master's presence between the acts by saying to the men next to him. "Do you see that gentleman in the box? That's Mr. Slickun, the celebrated lawyer. Never heard of him? Why, he's at the top of his profession!" This is not unfrequently followed by some fat fees.—*Chicago Law Journal.*

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Juries in England:—*Apropos* of the agitation of civilians in this country that trial by jury is a failure in India and that the law should be modified so as to permit the judge to cross examine the jury, the following extract from an account of the life of Lord Bramwell one of the most eminent judges who have adorned the English Bench in recent times will be of interest,

"Perhaps no judge was ever more at home with a jury than Baron Bramwell: and if the special jury was unusually good one, a trial under his guidance was all that a lover of justice could desire. He was not blind to the faults of juries. 'If juries had to give the reasons for their verdicts' he once said 'trial by jury would not last five years.'—*Temple Bar.*

The career of a successful Lawyer.—The career of a successful lawyer makes people sometimes ask, is the game worth the candle; is it worth the life of incessant toil which success implies, scorning delights and living laborious days? How many clutch the bauble only to drop into their graves? Even the fruits of success, what are they, it is asked, but Dead Sea apples which turn to dust and ashes in the mouth? 'My dear Oliver,' said Lord Eldon to a friend, let me warn you never to be ambitious of the highest honours of the law. Believe me when I give you my word that I have not known a single day of full freedom from anxiety since I have held the seal. Such counsels or criticisms savour too much of the cynic tub, and they are false besides, because

they overlook the fact that in law as in other careers it is not the prize itself, but the race which is the real reward.

> Just as the falconer takes delight
> Not in the quarry, but the flight.

To men by temperament and talents fitted for the exercise of their profession, like the late Lord Bowen or Lord Coleridge or Lord Wensleydale, law answers the definition of happiness given by Aristotle. It may be the conveyancer's secret joy in working out satisfactorily the intricate limitations of a settlement; it may be the academic lawyer's keen zest in tracing the growth and development of law; it may be advocate's fierce delight of battle with his peers; but whichever it be, it is this energy—the full tide of intellectual life—which is the lawyer's true reward.—*The Law Journal.*

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Some Hints on Speaking:—When old Geoge Stephenson, the engineer, was on one of his visits at Drayton, Sir Robert Peel's place, an animated discussion took place between the old engineer and Dr. Buckland on one of his favourite theories as to formation of coal. But the result was that Dr. Buckland, a much greater master of tongue fence than Mr. Stephenson, completely silenced him. Next morning before breakfast, when he was walking in the grounds, Sir William Follett, the eminent lawyer, came up and asked him what he was thinking about. 'Why, Sir William, I am thinking over that argument I had with *Buckland* last night. I know I am right, and that if I had only the command of words which he has, I would have beaten him.' 'Let me know all about it,' said Sir William, 'and I shall see what I can do for you.' The two sat down in an arbour, and the astute lawyer made himself thoroughly acquainted with the points of the case, entering into it with all the zeal of an advocate about to plead the dearest interests of his client. After he had mastered the subject, Sir William rose up, rubbing his hands with glee, and said, 'Now I am ready for him.' Sir Robert Peel was made acquainted with the plan, and adroitly introduced the subject of the controversy after dinner. The result was, that in the argument which followed, the man of science was overcome by the man of law, and Sir William Follett had at all points the mastery over Dr. Buckland. 'What do you say, Mr. Stephenson,' asked Sir Robert, laughing. 'Why,' said he,' I will only say this, that of all the powers above and under the earth there seems to me to be no power so great as the gift of the gab.'

The 'gift of the gab,' or the art of speaking, must always have an interest for lawyers as professional advocates. It is not merely for a

knowledge of law that a client pays his lawyers. He pays him for his power of putting his case persuasively, for his courage, his address, his conduct of the case—in a word, for his advocacy. When Stephenson called it ' the gift of the gab ' he was using a popular phrase, but one which has an element of truth. It is a gift. The orator—the supreme orator—is born, not made. Sir John Bright thought, so many others have thought; but those who have read the life of Demosthenes, or Cicero, or Curran, or Lord Brougham, and noted the infinite pains which they bestowed on the cultivation of their natural gifts and the curing of their natural defects, will see that there is as much, if not more, in art, than in nature. We all know the stories of Demosthenes haranguing the wild sea waves to familiarise himself with the stormy Ecclesia, of his putting pebbles in his mouth to cure his stammering; but it is not so well known that his first attempt to speak was a complete failure, that he shut himself up for two or three months together in a subterranean chamber in order to practice declamation, that he wrote out Thucydides eight times to form his style, that he studied all the best rhetorical treatises, that he recited, under the direction of an actor, long passages from Sophecles and Euripides, that he ran uphill daily to strengthen his lungs and his voice. ' *Sic itur ad astra !* Unquestionably all these things, the whole art of rhetoric, is far too much to say that, neither in England nor America, are there any orators extant as the ancients understood an orator or even as Pitt or Canning or Brougham understood the word. The Americans, however, without being orators are good speakers, better, at least, in many points than Englishmen; less clumsy, less confused. They may not be superior in invention or in diction, but they possess, as their critic Mr. James Bryce admits, more fluency, more readiness, more self possession. Any American can reel off a creditable, often an eloquent speech at a minute's notice, to the astonishment and envy of an Englishman. They have more quickness, too, in catching the temper and tendencies of an audience, more weight, animation, and grace in delivery, and crowning all this, more humour. Any rules for speaking, the result of American experience, are therefore well worthy of consideration. Here are some :—

1. *The speaker must be in earnest.* He must have something to say, of course; but this is not all. He must have, in Carlyle's phrase a ' message to deliver '—must believe or seem to believe every word he utters. This is what Aristotle calls the power of convincing, and it is as true of the lawyer advocate as of the preacher, the statesman, or the prophet. The lawyer must believe in his own case, however bad it may be. This is where sometimes a good lawer, because he is a good lawyer, fails as an advocate; he cannot argue against his convictions, Rule 2

is this: *Never carry a scrap of paper before an audience.* Nothing destroys so much the 'magnetic contact' which ought to subsist between a speaker and his audience as reading or reference to papers. Spontaneity is the essence of successful speaking. The late Bishop of Lichfield's advice to his curates on preaching was, 'Write your sermon, read it over three times, throw it in the fire, and preach what you remember of it' a very good recipe for a speech as well as sermon. Scarlett, the greatest of verdict winners, never prepared his speeches. He thought out his ideas and trusted to the inspiration of the moment for the language. Had he merely fired off speeches at the Jury he would never have got on those good terms with them which led to his being called a 'thirteenth Juryman.' An eminent Judge told a friend, that he once lost a case on which he felt very sure, though his successful antogonist was a man not to be compared with him as a lawer. When asked the reason, he said 'It was very curious; I had all the law and all the evidence, but that bellow Hale got so intimate with the Jury that he won the case?

It is all very well to say this, 'I never carry a scrap of paper before an audience;' but what is a speaker who has not got a good memory to do—a speaker who has not the copiousness and ordered intellect of a Pitt or Gladstone? A preacher who had relied on his own resources in this way once got into the pulpit, but when he found himself face to face with his congregation, his ideas vanished, his mind was a blank. He tapped his forehead, but in vain, his ideas would not come. 'My friends,' he said, I pity you; you have lost a fine sermon, etc., he descended the pulpit steps. But all have not this equanimity. A speech on the other hand, learnt by heart may be a splendid *tour de force*, but as a speech it must be defective. It dazzles, but does not persuade. Macaulay's brilliant and highly finished orations are an instance. They fell flat in the House of Commons, as Greville tells us when a light, dashing and vivacious, imprompta speech was applanded to the echo. If, then, you must have, as most must, some mechanical aids, *plan out*—this is the third rule—*a series of a few points as simple and orderly as possible* using catch words which will suggest the leading thought This method prompts the memory without overburthening it. It was Mr. Bright's method. The fourth rule is, *Plan before hand one good fact and one good illustration or anecdote for* each point. This brightens a speech, and gives body to it. But the best—laid plans are liable to be disconcerted, and we can sympathise with the dismay of the guest of the evening at an American banquet as he heard his chosen anecdote, retailed one after another by preceeding speakers.

Rule 5 is, speak in a natural voice, in a conversational way. This may be good advice for an after-dinner speech or the discussion of a bill in committee of the house——rhetorical rhapsodies are then out of place——but it cannot be accepted as a general rule for speaking. It will never do for the highest efforts. The voice is everything in the orator, and to attain elevation in oratory, to touch the deeper springs of feeling, the voice must be nicely modulated; it must vary, as Aristotle points out, with the theme of the speaker; it must rise and fall, sink or swell, vibrating in unison with the orator's moods. Garrick said he would give £100 to say 'Oh!' as Whitfield did, and one who heard Newman preach at Oxford could never forget the tone in which he uttered the word 'irreparable.' The voice is the soul of oratory. But for the genteel comedy of life, a natural voice, an easy conversational tone, is no doubt the best.

Those rules are good, but they omit one rule which Aristotle places in the forefront in speaking. It is to have the good-will of your audience. We know the *Nisi Prius* advocate is accustomed to get this by administering judicious flattery to the jury, but this has to be done adroitly now, not in the Buzfuz vein, or it only disgusts. A jest is, perhaps, the best thing for putting a speaker on good terms with his audience. This was Sheridan's way. He was once asked how it was he got on so well in the house. 'I soon found out,' he replied, that nine out of ten were fools, but all loved a joke, and I determined to give them what they liked.' The consequence was a glow of pleasurable anticipation, seldom disappointed, whenever Sheridan rose to speak.

'A good speech,' said O'Connell, 'is a good thing, but the verdict is *the* thing.' It is well for the forensic orator to remember this. Scarlett, perhaps, knew better than anyone, how verdicts are won, and Scarlett said, as the result of his experience, that the most useful duty of an advocate was examination of witnesses :—*The Law Journal.*

* * *

Justice not only blind, but also deaf.—Lord Westbury, says Sergeant Robinson, once remarked to Chief justice Erle, after the latter's retirement: "I wish, Erle, you would sometimes come into the Privy Council and relieve me from my onerous duties there, for we can't get on without three and there is no one else I can apply to." Erle said, he would willingly come, but he was getting a little deaf, and was afraid that might interfere with his power of doing full justice. "Not at all, my dear fellow," said Westbury. "Of my two usual colleagues—— is as deaf as a post and hears nothing,—is so stupid that he can under-

stand nothing he hears, and yet we three together make an admirable court.—*Chicago Law Journal.*

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Tipping ye Judge for swearing ye witnesses.—It sometimes happens in Court that the Clerk may be away from his desk when a witness is called, and in such case it is customary for the Judge to administer the oath. Of course if it happened too often, the Judge might scold, but they are willing to accommodate. Judge Hasket makes a practice of charging against the clerk a cigar for every oath which he administers. —*American Law Review.*

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Right of Privacy: Surgeon Photographing Patient—Operating upon Patient in presence of Medical Students.—A novel action at law is pending in the Circuit Court of the City of St. Louis, involving a doctrine of quite recent origin which passes under the designation of the right of privacy. The action is brought by Anita May George, an infant by her next friend against Dr. Augustus C. Bernays a very eminent Surgeon of the City of St. Louis. The plaintiff, when two years of age, swallowed a quantity of concentrated lye by reason of which the oesophogus became closed, so that for four years, she received her nourishment through rectal injections and through a fistula established by a successful operation of gastrostomy. When the child had attained the age of six and a half years, Dr. Bernays took her into his charge and succeeded in opening the oesophagus and enabling her to take her nourishment in the natural way, through a series of surgical operations which must excite the admiration of science. The principal operations upon the little patient were performed at the Marion-Sims College of Medicine, of St. Louis and were witnessed by quite a number of Surgeons and Medical Students and also by the mother of the child. A description of these operations was published by the defendant, accompanied by a photograph of the child stripped to the waist, showing where the various incisions in her body had been made, and illustrating the printed description given of the operations. We have had the advantage of perusing the pamphlet of Dr. Bernays, and it almost challenges belief that human skill could go so far. It is scarcely necessary to say that the name of the child was carefully concealed in this pamphlet by the use of initials merely, and those moreover, were false initials. In return for this remarkable success, the eminent Surgeon experienced the gratitude which the benefactors of mankind so often receive at the hands of those whom they have benefitted. The mother of the child took it into her

head to have an action at law brought against Dr. Bernays by the little patient seeing through a *prochein ami* claiming heavy damages on the ground that he had violated her right of privacy in two particulars, first, in allowing outside parties to witness the surgical operations which he performed upon her; second, in publishing in a pamphlet already referred to, a description of the operations together with a photograph of the patient; and the petition claims exemplary damages. As the action is pending, and as it involves no question of public right, we withhold further comment upon it. We assume that, whatever may be the outcome of it, it will ultimately be decided either in the Supreme Court of Missouri or in St. Louis Court of Appeals. The profession will anticipate the decision with curiosity and interest. The case will be well presented by Charles M. Napton for the plaintiff, and Frank M. Estes for the defendant—*American Law Review.*

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Right to produce a play based upon the facts of a criminal case pending its trial. The expression of one's sentiment through the medium of a play held to be within the constitutional guarantee of right of Free Speech and therefore not subject to injunction proceedings.—A novel and exceedingly interesting point was decided by the Supreme Court of the State of California on March 24th 1896. It arose in the matter of William R. Dailey, a playwright, who applied to the Supreme Court for a writ of certiorari, to set aside an order made by Judge Murphy of the Superior Court of the city and county of San Francisco, restraining Dailey and others from producing a play entitled, "The Crime of the Century," pending the trial of Durrant for the ghastly murder of Blanche Lamont, of which he was subsequently convicted. The name of Durrant and the crimes with which he was charged are now matter of public knowledge. It may be said however that he was charged with two separate murders; one with the murder of Blanche Lamont, and the other with that of Minnie Williams. The bodies of both of the victims are accidentally found concealed in the Emanuel Baptist Church in San Francisco, and everything indicated that they had been strangled to death within that sacred edifice. Durrant was tried for the murder of Blanche Lamont. The evidence was entirely circumstantial, but the chain or incriminating circumstances was so convincingly interwoven and pointed so strongly to Durrant as the only culprit, that the jury found him guilty, after a most sensational trial, on the very first ballot. Execution has been deferred pending the result of an appeal. The play, as may well be expected, was of a highly sensational nature, and

was of a character likely to inflame the public mind, which was already strongly prejudiced against the prisoner. This is conclusively demonstrated that out of some 1300 citizens summoned as jurors, 482 were challenged for cause; a large portion of them having fixed opinions of the defendant. Before the production of the play, the attorneys for Durrant brought the matter of the proposed production to the attention of the Court, and the affidavit of Durrant was presented to the effect that the production of the play would deprive him of an impartial trial, to which he was entitled by the constitution of the United States. Judge Murphy, upon the showing made, entered an order enjoining the production of the play during the trial. This order was appealed from. Meanwhile the play was stayed and advertised to take place at the Alcazar Theatre. At the opening night, it was crowded by a curious and motley assemblage. The officers of the law, however, were on hand, and when the play was well under way, ascended the stage and placed the entire company under arrest on warrants for contempt of court in disobeying the judge's order. Punishment was duly inflicted, but the parties were released, pending the determination of the Supreme Court on the appeal originally taken from the order of injunction. This decision was handed down a few days ago, and holds, substantially, that judge Murphy had no power to issue the original order of injunction, and that, therefore, the contempt proceedings were null and void. In other words the decision declares that the trial judge was too previous and should have waited until the piece had been actually produced before he had any right to issue an order of injunction. The rationale of the decision is, that to produce a play is but one way of expressing one's sentiments on a particular subject, that the right of free speech is guaranteed to every one by the constitution, and cannot be impaired or arrested by an injunction; but that the individual is responsible for his statements afterwards. It must be admitted upon a perusal of the opinion, that it is a dignified and forcible indication of the fundamental right of free speech. Mr. Justice Garoutte wrote the the opinion which was concurred in by Chief Justice Beatty, and the rest of the Bench excepting Justices McFarland and Temple. The portions of the prevailing opinion of interest are as follows. "The production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author, and as to the question here presented for our consideration it is immaterial whether the words be publicly spoken from the stage or upon the hustings, or go to the world through the channels of the printing press. By the constitutional provision we are about to work, a citizen may speak, write or publish his sentiments with equal freedom and this case now

stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court where such trial was pending and in progress, believing such publication would interefere with the due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper. We are entirely clear that the court has no jurisdiction to make this order which forms the basis of this proceeding, for such order was an attempted infringement upon rights guaranteed to every citizen by section 9 of article 1 of the constitution of the state. That section provides; 'every citizen may freely speak, write and publish his sentiment on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press.' The wording of this section is terse and vigorous and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write and publish his sentiments is unlimited, but he is responsible to the law for the abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write or publish, but he shall be held accountable to the law for what he speaks, what he writes or what he publishes. It is patent that this right to speak, write and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose." The following apt quotation from Blackstone is made in the course of the opinion; "The liberty of the press consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases, before the public; to forbid this is to destroy the freedom of the press. But if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done, before and since the revolution of 1688, is to subject all freedom of sentiment to the prejudice of one man, and makes him the arbitrary and infalliable gauge of all controverted points in learning, religion and government." The opinion concludes as follows; "In effect the order made by the trial courts in this case was one commanding the petitioner not to commit a contempt of court and such a practice is novel in the extreme. The court had ample power to protect itself in the administration of justice after the contempt

2. *Daily* v. *Superior Court*, 44 Pac. Rep. 458.

3. See 30 American Law Review, p. 29, for a complete review of the trial.

was committed. As to the offender it could punish him; as to the defendant on trial he could be deprived of no rights by any act of this petitioner. If the publication deprived him of a fair and impartial trial, a second trial would have been awarded him. We conclude that the order made by the trial court was an attempted restraint upon the right of free speech as guaranteed by the constitution of the State and that petitioner's mouth could not be closed in advance for the purpose of preventing an utterance of sentiments, however mischievous to the prospective results of such utterance. He had the right of free speech, but at all times was responsible to the law for an abuse of that right. For the foregoing reasons the order is annulled as being beyond the power of the court to make.

The dessenting opinion contains a proposition which is well worthy of serious consideration as a limitation of the right of free speech, where it affects the rights of a defendant actually on trial for his life or liberty, and does interfere with the administration of justice and deprive him of a fair and impartial trial. The opinion being very brief I will quote it, in full. "I dissent. All the provisions of the constitution must be construed together and effect given, when possible, to each. The one (section 9 of article 1), which provides that every citizen may fairly speak etc, is to be construed in view of that large and important part of the constitution by which a judicial department of the Government is erected and all the usual and necessary powers of courts given to the tribunals established under it. One of the most essential of these powers of a court is to protect itself against unlawful intrusion upon its orderly conduct of business and to insure litigants in a pending proceeding the full and unembarrassed administration of justice. In the case at bar, in a court of record established by the constitution, a trial was gravely progressing in which a man's life was at stake and an act was about to be done which, it is admitted, would be an interference with the administration of justice and deprive him of a fair and impartial trial. Is it possible that a court is powerless to protect a defendant in a case pending before it from an act that would deprive him of a fair and impartial trail? In my opinion the power given by section 9 of Article 1, not to be stopped before hand from speaking slander and writing libels, does not include the right not to be stopped from interfering in a pending proceeding in a Court and preventing a party thereto from having a fair and impartial trial. The right to slander and libel individuals and the right of a Court to prevent interference with a course of justice in a pending trial are not inconsistent and may both stand together. And I think that the cases where it has been held that a threatened publication could not be enjoined will be

found to be nearly all threatened cases of threatened libels against individuals or property, and not cases where there was a threatened interference with a pending proceeding in a Court and an attempt to deprive a party thereto of a fair and impartial trial. I think the order under review should be affirmed."

It must be conceded that a great deal may be said on this question *pro* and *con*. The position assumed in the dessenting opinion suggests a limitation of a great right of free speech which does not seem to be inconsistent with it. The securing of a fair and impartial trial is equally as important to the Common—Wealth as that of free speech especially when the right is exercised in the shape of plays which have the effect of prejudicing a man's guilt in the eyes of the public. No other result could flow from the production of "the Crime of the Century" than to still further inflame and prejudice the public mind against the prisoner Durrant. It may be retorted that the defendant could have obtained a change of venue. But this would have entailed additional expense and annoyance. If a Court, trying a man for his life has the paramount power to secure him a fair and impartial trial,—which, the constitution and laws of this country certainly meant to confer—it is difficult to see why, in the case referred to, it did not also have the power to make the original order of injunction. It is conceded in the prevailing opinion, that the Court, after a contempt had been committed, would have jurisdiction to apprehend and punish offenders. If that be true it would be seen, at least logically, that the Court should also possess the power to prevent the mischief. The proposition may be summed up thus:—That the right of free speech should be exercised to subserve the ends of justice and not to obstruct or impair it, that it should be permissible for one to speak, write or publish his sentiments, even though a prisoner may be on trial for his life, but that this does not comprehend the right, also, to so speak, write, or publish, as to frustrate that constitutional privilege that one accused of crime should have a fair and impartial trial, and it wound seem that a court inherently possesses the power to see to it that a defendant on trial should be reasonably protected in that right.—*M. B. W.*—*American Law Review.*

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"*The Age of Consent*" is a legal term, meaning the age at which a girl may consent to her own ruin. A girl of thirteen years is, by the laws of Iowa, New Hampshire and Utah, presumably a woman, and no one is answerable for her virtue but herself. The Delaware rape law fixed the age of consent at seven years. Next comes North and South

Carolina, Alabama, Mississippi and Florida with ten years as the age of consent. The twelve year States are Virginia, West Virginia, Kentucky, Tennessee, Louisiana and Nevada. The thirteen year States are New Hampshire, Iowa and Utah. The fourteen year States are Georgia, Maine, Vermont, Maryland, Ohio, Indiana, Illinois, Wisconsin, New Mexico and California. Texas is the only fifteen year state. The sixteen year States are Massachusetts, Rhode Island, Connecticut, New Jersey, Michigan, Minnesota, North Dakota, South Dakota, Montana, Washington, Oregon, Arkansas and Pennsylvania. The States that are out of the black list, or in other words, have a law putting the age of consent at eighteen, are New York, Kansas, Colorado, Arizona, Wyoming, Idaho, Webraska and Missouri.

Can the State of Illinois afford to leave her law of consent as it is, placing at fourteen years the age at which a girl may consent to her ruin,—the age at which a man may seduce a girl, provided he wins her consent? Are Wisconsin, Indiana and Illinois satisfied to leave their age of consent at fourteen years? Though Illinois cannot reproach any of her sister States of the middle—west except Iowa they all having done better than she, yet why shouldn't Michigan, Minnesota, North and South Dakota and the States west of us fairly compel Illinois by the force of example to raise the age of consent to eighteen? The States above name have placed the dividing line at sixteen. New York's last legislature after having placed all specious pleas for poor, weak boys and men who may be victimized by fathers and mothers of girls, and after having heard all the miserable pleas of conservatives for compromise on sixteen years unanimously passed a law raising the age of consent to eighteen. Can Illinois afford to do less?—*Chicago Law Journal.*

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Gets Her Divorce in an Hour:—Mrs. Cadwallader, of Logansport, Ind., separated from her husband at 9a m., 27th ult., filed a bill for divorce at 9. 30, and appearance being waived, the divorce was granted at 10 o'clock:—*Chicago Law Journal.*

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In His power:—A Judge, in sentencing a prisoner, said: "Do you know that for these repeated breaches of the law it is within my power to sentence you to a term of penal servitude far exceeding your natural life?"—*Chicago Law Journal.*

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A Young Legal Mind.—There is a a boy in Bradford, Pa., who should excel as a cross examiner when he grows up. In the Police Court

there, he and others were charged with stone throwing, and he thus cross-examined the police officer:

"How many windows did you say were broken?"

"Four."

"And How many stones did you find inside?"

"Three."

"But how you charge five boys with breaking four windows with three stones."

The query puzzled the police man and the boys get off:—*Chicago Law Journal.*

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A curious case has just been decided by the Supreme Court of Ohio. Jacol Schumucker bought a farm belonging to the estate of a farmer named Cadwallader. Schumucker and his hired man, according to the testimony of the latter, found two pailfuls of gold and silver money on the farm. Schumucker refused to divide with the hired man, who sued for a share. Thus the find came to the knowledge of the Cadwallader heirs, who sued for the whole of it. The Supreme Court awards it all to Schumucker on the ground that no one proves a better right to it. The theory of the decision seems to be that the purchaser of the farm bought all there was on it, unless the ownership of anything found thereon by some one else could be clearly proved. This shut out the hired man, because the farm wasn't his, and his only claim to ownership of the treasure was that of a finder. And it shut out the heirs because the they could not prove ownership otherwise than as legatees, and that, such as it was with respect to the treasure, has been disposed of by sale:—*Chicago Law Journal.*

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Contracts:—Accidental destruction of subject matter—Determination of loss.

Chicago Edison & Co., v. *Huyett and Smith Manufacturing Company.*—Where a party having a contract with the owner of a building to place a certain plant therein, subjects to another the making and putting in place a distinct portion of said plant, to be paid for when completely installed, and the building, during the progress of putting in said machinery is accidentally destroyed by fire together with all such machinery, the sub-contract was executory, and the loss of such machinery must be borne by the sub-contractory.

——*Distinction between contracts for work and labour and contracts of sale.* If the contract be such that when carried out it would result in the sale of a chattel the contractor cannot sue for work and labour.—*Chicago Law Journal.*

REVIEWS.

A Commentary on the Indian Registration Act by *A. Rajagopala Aiyar,* B.A., B.L., :—

We owe an apology to Mr. A. Rajagopala Aiyar for not having noticed his book earlier. His book is undoubtedly the best commentary on the Registration Act, now in the field. He has spared no pains to make his book useful to the practitioner. The notes are copious and well arranged and give references to all cases decided up to date on the law of Registration. The introduction gives an interesting sketch of the history of the law of Registration in England and in India, and the appendix contains the earlier Registration Acts and the rules framed under the Act in this Presidency. We hope the book will be fully appreciated by practitioners and Registration Officers.

The Indian Penal Code annotated by *Bamapada Mukerji,* M.A. B.L., and *Hem Chandra Mitra* :—

This is a handy edition of the Penal Code which aims at giving a full reference to all the decided cases in this branch of the law. There is, however, hardly any arrangement in the notes and it costs no little trouble to wade through the cases noted under any particular section, before one finds the authority he requires. The handiness of the book appears to be its chief, if not, the only *raisonne détre.*